

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1178

UNITED STATES,

Petitioner

—v.—

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

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**THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF COLORADO**

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY
RIGHTS TO THE USE OF WATER FOR IRRIGATION AND
OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO.
37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
PETITIONER

RELEVANT DOCKET ENTRIES

1967

October 2	Petition for Supplemental Adjudication of Water Rights
October 13	Certified List, Claimants of Water Rights, State Engineer
October 20	Notice of Application for Supplemental Adjudication of Water Rights

1968

March 22	Motion to Dismiss the United States for Lack of Jurisdiction
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THE SUPREME COURT OF THE
STATE OF COLORADO

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE HAROLD A. GRANT, RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS, CEN-
TRAL COLORADO WATER CONSERVANCY DISTRICT, AND
THE NEW JERSEY ZINC COMPANY, INTERVENORS

RELEVANT DOCKET ENTRIES

ORIGINAL PROCEEDING

1968

October 17	Application of the United States for Writ in the Nature of Prohibition filed
October 31	Rule to Show Cause issued
November 29	Answer to Rule to Show Cause

1969

September 15	Opinion
October 1	Order discharging Rule to Show Cause

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY
RIGHTS TO THE USE OF WATER FOR IRRIGATION AND
OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO.
37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
PETITIONER

NOTICE OF APPLICATION FOR SUPPLEMENTAL
ADJUDICATION OF WATER RIGHTS

THE PEOPLE OF THE STATE OF COLORADO TO:

All persons, associations and corporations interested in the priority of rights to the use of water for beneficial purposes in Water District No. 37.

YOU ARE HEREBY NOTIFIED That the above named Petitioner has filed a petition, entitled as above, in which it prays for the supplemental adjudication of all water rights for beneficial purposes in Water District No. 37.

YOU ARE FURTHER NOTIFIED That said court did, by an Order entered herein, designate and appoint Friday, the 22nd day of December, 1967, at the hour of 10:00 o'clock A.M., at the District Courtroom in the Courthouse at Eagle, in Eagle County, Colorado, as the time and place for the beginning of the taking of evidence in said adjudication. Said evidence shall be taken by and before the Court.

All owners and claimants of any water rights in said District are hereby notified to file a statement of claim and to appear at said time and place so appointed and designated for the taking of evidence, in regard to all water rights owned or claimed by them. All water users within said District are further notified to be present at the time and place appointed for the beginning of the taking of evidence as above set forth, in case they wish to resist a claim which may be made for any water right

in said suit or proceeding, except that this notice shall not require any owner or claimant of a water right which has already been adjudicated to submit such water right in this supplemental adjudication.

YOU ARE FURTHER NOTIFIED that in said petition, filed as aforesaid, the petitioner asked for an adjudication of the following amounts of water as set opposite each of its claims herein, to-wit:

- (a) The Wolcott Reservoir—65,975 acre feet of water, including 810 acre feet of dead storage;
- (b) Wolcott Pumping Pipeline—500 cubic feet of water per second of time;

all dating back to April 27, 1966 for municipal, industrial, domestic, irrigation, stock watering, electric power generation, recreational and other beneficial uses and purposes.

- (c) Nolan Creek Feeder Canal—38.5 cubic feet of water per second of time.
- (d) Hat Creek Feeder Canal—27.0 cubic feet of water per second of time,

all dating back to June 10, 1966 for irrigation, domestic, municipal, industrial and other beneficial uses and purposes;

All persons interested may, at the time and place appointed as aforesaid for commencing to hear and take evidence in said adjudication or at the time and place to which said hearing may be continued, present proof for or against the priority rights by appropriation claimed by the petitioner herein, and for or against any priority right by appropriation sought to be shown by any other party, by, through, or under any ditch, canal, reservoir, or other structure.

WITNESS my hand and the seal of said Court this 3rd day of October, 1967.

/s/ Anna L. Robidoux
ANNA L. ROBIDOUX
Clerk
District Court of
Eagle County, Colorado

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY
RIGHTS TO THE USE OF WATER FOR IRRIGATION AND
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37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
PETITIONER

MOTION TO DISMISS THE UNITED STATES
FOR LACK OF JURISDICTION

The United States moves this Court to dismiss the
United States from the above-captioned action for lack
of jurisdiction for the reasons set forth in the accom-
panying Memorandum of Points and Authorities.

/s/ Lawrence M. Henry
LAWRENCE M. HENRY
United States Attorney
Denver, Colorado

/s/ Warwick Downing II
WARWICK DOWNING II
Assistant United States
Attorney
Denver, Colorado

/s/ James W. Moorman
JAMES W. MOORMAN
Attorney, Department of
Justice
Washington, D. C.

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY
RIGHTS TO THE USE OF WATER FOR IRRIGATION AND
OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO.
37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
PETITIONER

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS THE UNITED STATES FOR LACK
OF JURISDICTION

* * *

V FORMER ADJUDICATIONS & RIGHTS OF THE
UNITED STATES IN WATER DISTRICT NO. 37

The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the purpose of said withdrawal with a priority of August 25, 1905.

In addition to our general reserved right, the United States will claim various specific uses, as follows:

(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with

the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

(c) 10 C.F.S. for the Minturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S 87° 25'W, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S 75° 31'W, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time.

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY
RIGHTS TO THE USE OF WATER FOR IRRIGATION AND
OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO.
37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
PETITIONER

SUPPLEMENT TO MEMORANDUM OF POINTS AND AUTHOR-
ITIES IN SUPPORT OF MOTION TO DISMISS THE UNITED
STATES FOR LACK OF JURISDICTION

On pages 12 and 13 of our Memorandum of Points and Authorities, we state in summary the rights the United States claims in Water District 37 for the purpose of indicating their nature and the dates claimed. On page 13 it is stated that "Additional specific uses may be claimed." It is the purpose of this supplement to indicate briefly the nature and date of certain additional rights claimed by the United States, but which were only reported to the Department of Justice in the past two weeks.

(1) On page 13, we noted 228 uses which the United States would claim under a National Forest reservation date of August 25, 1905. Based on more accurate information, however, the United States claims 375 such uses. Current uses amount to .449 c.f.s. and 59.8 acre feet. Foreseeable uses amount to 954 c.f.s. and 420.7 acre feet.

(2) The United States also claims 14 uses on certain acquired lands within the White River National Forest. The dates for these uses have not yet been determined.

(3) The United States claims 19 rights to use springs and waterholes on lands managed by the Bureau of Land Management. In regard to these springs the United States claims a reservation date of April 17, 1926, based on an Executive Order issued that date entitled Public

Water Reserve No. 107. In addition to the April 17, 1926, reservation date, the United States claims it has priority to use these springs under § 148-2-2, Colo. Rev. Stat. (1963). In the alternative, the United States will claim priorities at least as early as the early 1940's for most of the springs.

(4) The United States claims rights for approximately 75 additional uses on lands managed by the Bureau of Land Management for livestock, wildlife and recreation. These uses fall into two principal categories: (a) small reservoirs or retention dams; and (b) small diversions from both perennial and intermittent streams. The United States claims priorities in the 1940's, 1950's and 1960's for the reservoirs and retention dams. Information concerning the priorities for the diversions has not yet been supplied to the Department of Justice. In addition, the United States may claim a reservation date for some of these rights.

/s/ Lawrence M. Henry
LAWRENCE M. HENRY
United States Attorney
Denver, Colorado

/s/ Warwick Downing II
WARWICK DOWNING II
Assistant United States
Attorney

/s/ James W. Moorman
JAMES W. MOORMAN
Attorney, Department of
Justice
Washington, D. C.
August 7, 1968

No. ———

IN THE SUPREME COURT
OF THE STATE OF COLORADO

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE WILLIAM H. LUBY

APPLICATION FOR WRIT IN THE NATURE OF PROHIBITION

COMES NOW the United States of America by United States Attorney, Lawrence M. Henry, Assistant Attorney General, Clyde O. Martz, Chief, Appellate Section, Roger P. Marquis, Assistant United States Attorney, Warwick Downing, II, and Attorney, Department of Justice, James W. Moorman, and PRAYS that an alternative Writ in the Nature of Prohibition issue out of this Court to the District Court in and for the County of Eagle and State of Colorado and to the Judge thereof, the Honorable William H. Luby, prohibiting said court and Judge from asserting jurisdiction over the United States, from adjudicating any water rights of the United States or from purporting to bind the United States in Civil Action No. 1529, captioned IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO (a supplemental adjudication in Water District No. 37 under section 148-9-7, Colo.Rev.Stat. (1963)), for the reason that said court and Judge are wholly without jurisdiction over the United States. The grounds for this application and the circumstances out of which it arose are as follows:

(1) On November 2, 1967, the Attorney General of the United States received by registered mail a copy of NOTICE OF APPLICATION FOR SUPPLEMENTAL ADJUDICATION OF WATER RIGHTS for Civil No. 1529, a copy of which is attached hereto as Appendix A;

(2) The service of said notice was purportedly for the purpose of fulfilling [sic] the service requirements of 43 U.S.C. Sec. 666 (66 Stat. 560, known as the McCarren [sic] Amendment) whereby the United States has consented to being joined to certain general water adjudications.

(3) For the reasons summarized in this paragraph, and more fully set forth in the Memorandum of Points and Authorities submitted herewith, neither Civil No. 1529 nor any supplemental adjudication under Colorado law is a proceeding to which the United States has consented to be sued under 43 U.S.C. Sec. 666 or any other statute and therefore said court and Judge cannot lawfully attempt to assert jurisdiction over the United States:

(i) The United States cannot be subjected to the jurisdiction of any court without the consent of Congress;

(ii) The only statute passed by Congress consenting to water adjudications is 43 U.S.C. Sec. 666;

(iii) 43 U.S.C. Sec. 666 only consents to a general adjudication of a river system in which all rights of all water users are before the court;

(iv) The only rights a Colorado District Court can hear and adjudicate in a supplemental adjudication are rights acquired by appropriation within the water district since the last prior adjudication; the court cannot hear or determine rights determined in that or earlier prior adjudications;

(v) The court had no jurisdiction to adjudicate rights other than those arising under Colorado law, but the United States claims rights otherwise arising;

(vi) Water District 37 does not embrace an entire river system;

(vii) The last prior decree in a water adjudication in Water District No. 37 was entered on February 21, 1966, in proceedings to which the United States was not a party; and

(viii) Because of the reasons set forth in (iv)-(vii), neither Civil No. 1529, nor any supplemental adjudication under § 148-9-7, Colo.Rev.Stat. (1963), is the kind of general adjudication to which the United States has consented under 43 U.S.C. Sec. 666.

(4) The United States has not voluntarily subjected itself, as a plaintiff or petitioner, to any water adjudication in Water District No. 37.

(5) The said court and Judge have been informed by the United States and are aware that the United States owns various water rights within Water District No. 37, (see Appendix B), that said rights are entitled to priority dates which are prior to many rights adjudicated in supplemental adjudications in Water District No. 37 and that said rights have never been adjudicated.

(6) The assertion of jurisdiction over the United States by said court and Judge in Civil No. 1529 purports (a) to bind the United States to prior adjudications even though the United States was not a party to said proceedings and did not have its day in court and (b) to cut off and destroy the rights of the United States by subordinating the priorities of the United States to all other priorities in the Water District.

(7) On March , 1968, the United States filed with said court a Motion to Dismiss the United States from Civil No. 1529 and a Memorandum of Points and Authorities in support thereof detailing all the matters set forth in 3-6 above. A copy of said motion and brief together with a supplement thereto filed August 7, 1968, is attached hereto as Appendix B.

(8) On August 7, 1968, the motion of the United States was heard in open court in Eagle, Colorado, and all the matters set forth in 3-6 above were brought to the attention of said court.

(9) At said hearing on August 7, the City and County of Denver acting by, through and on behalf of its Board of Water Commissioners by its attorney, Glenn G. Saunders, argued that said court was indeed without jurisdiction over the United States and moved said court to order a Supplemental Notice to all water users to convert Civil 1529 into a general adjudication, all for the purpose of purportedly curing the jurisdictional defects raised by the United States. A copy of Denver's Motion for Supplemental Notice and Brief on Jurisdiction over the United States is attached hereto as Appendix C.

(10) On August 20, 1968, the Motion of Denver for Supplemental Notice was heard in open court. At said

hearing the United States again brought to said court's attention the matters set forth in 3-6 above. At this hearing all attorneys of other parties speaking to the subject more or less agreed to the need of a supplemental notice, thus admitting a deficiency in said court's jurisdiction. The United States opposed the supplemental notice on the ground that it would not have the effect under Colorado law intended by Denver in that it would not cure deficiencies in the supplemental adjudication which place it outside 43 U.S.C. Sec. 666. The United States filed at that time an Opposition to Motion for Supplemental Notice, a copy of which is attached as Appendix D. The United States also explains in detail in the Memorandum of Points and Authorities filed herewith why it opposes the supplemental notice and believes it would be of no effect.

(11) At said hearing on August 20, said Judge ruled from the bench that the motion of the United States to dismiss be denied and the motion of Denver for supplemental notice be denied. Said Judge has set October 21, 1968, as the last date for filing statements of claim and October 28 as the date for taking evidence in said matter.

(12) The question of jurisdiction of the United States in 1529 is one of great importance. The United States is the owner of many water rights in the State of Colorado. By and large these rights have not been adjudicated under Colorado adjudication procedures (148-9-1, et seq., C.R.S. (1963)). The United States, however, has recently been served in three additional supplemental adjudications:

- (1) W.D. 36, Dist. Ct., Summit Co., Civil No. 2371;
- (2) W.D. 51, Dist. Ct., Grand Co., Civil No. 1768;
and
- (3) W.D. 52, Dist. Ct., Eagle Co., Civil No. 1548.

The United States has filed motions to be dismissed from each of these adjudications, which motions are still pending. In addition, the United States has been informally advised by members of the Bar of Colorado that it may expect to be served in many more supplemental adjudications throughout Colorado. Thus it is clear that many

citizens of the State of Colorado are attempting to bind the United States to proceedings to which it was not a party and to cut off and destroy the rights of the United States by the means of having the courts of Colorado assert purported jurisdiction over the United States in supplemental adjudications. This creates the need for a clear opinion from this tribunal upholding the immunity of the United States from suit.

It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances.

WHEREFORE, the Petitioner, the United States of America prays this Honorable Court:

1. To take original jurisdiction in the matters thus presented to it;
2. To issue an order commanding the respondent court and Judge to show cause why they, and each of them, should not be prohibited from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529;

3. To issue an order prohibiting the respondents, said court and Judge, from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529.

LAWRENCE M. HENRY
United States Attorney

/s/ Clyde O. Martz
CLYDE O. MARTZ
Assistant Attorney General

/s/ Roger P. Marquis
ROGER P. MARQUIS
Chief, Appellate Section
WARWICK DOWNING, II
Assistant United States
Attorney

/s/ James W. Moorman
JAMES W. MOORMAN
Attorney
Department of Justice
Washington, D. C.

October 14, 1968

EXHIBIT A

IN THE SUPREME COURT
OF THE STATE OF COLORADO

23819

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE WILLIAM H. LUBY, RESPONDENTS

RULE TO SHOW CAUSE

THE PEOPLE OF THE STATE OF COLORADO TO
THE DISTRICT COURT OF EAGLE COUNTY AND
THE HONORABLE WILLIAM H. LUBY, A JUDGE
THEREOF,

GREETING:

You are hereby ordered and directed to appear in the Supreme Court of the State of Colorado within thirty days from service hereof and answer in writing and show cause, if any you may or can have, why the relief requested in the petition herein should not be granted.

You are further ordered to stay all further proceedings in the within cause of action until further order of Court.

Let a true copy of this rule, together with a copy of the petition herein be served upon you and each of you.

WITNESS, the Honorable O. OTTO MOORE, Chief Justice of our Supreme Court, and the seal of said Court, in the City of Denver, this thirty-first day of October, A.D. 1968.

RICHARD D. TURELLI
Clerk of the Supreme Court
of the State of Colorado

By /s/ Evelyn F. Oliver
Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF COLORADO

No. 23819

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE WILLIAM H. LUBY, RESPONDENTS
THE COLORADO RIVER WATER CONSERVATION DISTRICT,
INTERVENOR

ANSWER

The respondents herein, the District Court in and for the County of Eagle and State of Colorado, and the Honorable William H. Luby, the Judge thereof, by their attorneys, and in compliance with the Rule to Show Cause entered herein respectfully submit the following answer:

The Court below and the Judge thereof had before it at the time of ruling on the Motion of the United States to Dismiss as to it and the Motion of the City and County of Denver for Supplemental Notice, the statutes of the State of Colorado and briefs prepared by the attorneys of the various parties appearing before the Court, as well as oral argument by such counsel.

The Court and the Judge thereof considered itself bound by prior rulings of Federal Courts on the identical question presented by the Motion of the United States to Dismiss as to it, relying principally upon *In re Green River Drainage Area*, 147 Fed. Supp. 127 and *Four Counties Water Users Association v. The Colorado River Water Conservation District* and the *United States of America*, Civil Action No. 8880 in the United States District Court for the District of Colorado.

The Court and the Judge thereof further deemed the Notice given to be in compliance with statute and therefore sufficient.

The Court and the Judge thereof respectfully request this Court to consider the brief of the Intervenor, The Colorado River Water Conservation District as its brief in support of this answer.

Respectfully presented,

DELANEY & BALCOMB

By /s/ Kenneth Balcomb
 KENNETH BALCOMB
 Attorneys for the
 Respondents,
 P.O. Drawer 790
 Glenwood Springs, Colorado
 945-6546

No. 23819

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE HAROLD A. GRANT, RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS, CENTRAL
COLORADO WATER CONSERVANCY DISTRICT, AND
THE NEW JERSEY ZINC COMPANY, INTERVENORS

ORIGINAL PROCEEDING

EN BANC

RULE DISCHARGED

Clyde O. Martz, Assistant Attorney General
Shiro Kashiwa, Assistant Attorney General
Lawrence M. Henry, United States Attorney
James L. Treece, United States Attorney
Warwick Downing II, Assistant United States Attorney
Roger P. Marquis, Attorney, Department of Justice
James W. Moorman, Attorney, Department of Justice
David Osborne, Attorney, Department of Justice

Attorneys for Petitioner,

Delaney and Balcomb,
Kenneth Balcomb,

Respondent, District Court and Judge thereof, and
the Intervenor, The Colorado River Water Conserva-
tion District

George L. Zoellner,
Glenn G. Saunders,

Intervenor, City and County of Denver, acting by
and through its Board of Water Commissioners

Miller and Ruyle,
David J. Miller,
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Intervenor, Central Colorado Water Conservancy
District

Dawson, Nagel, Sherman & Howard,
Don H. Sherwood,
Raphael J. Moses,
Intervenor, New Jersey Zinc Company
Attorneys for Respondents

MR. JUSTICE GROVES delivered the opinion of the
Court

This is an original proceeding in this court wherein the United States has asked for a writ prohibiting the district court from asserting jurisdiction over it in a supplemental water adjudication under C.R.S. 1963, 148-9-7. We issued a rule to show cause why the relief requested should not be granted.

The proceeding is in Water District 37 of the State of Colorado, which embraces the Eagle River and its tributaries. The Eagle River is a tributary of the Colorado River and is non-navigable. There have been a number of previous adjudications in this water district. The decree in the original adjudication was entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings.

The current proceedings were commenced by the Colorado River Water Conservancy District and it sought to make the United States a party under 43 U.S.C. § 666 (known as the McCarran Amendment) which reads in part as follows:

"(a) *Joinder of United States as Defendant; Costs.* Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights,

where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

“(b) *Service of Summons*. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.”

The United States moved the district court for dismissal as to it by reason of lack of jurisdiction. This motion was denied by the Honorable William H. Luby, the judge of the court, who has since retired. We have concluded that the district court has jurisdiction over the United States in these proceedings and that the motion was properly denied.

The propositions asserted by the United States are based upon the solid foundation that: (1) the United States cannot be subjected to the jurisdiction of any court without the consent of Congress; and (2) the only statute adopted by the Congress consenting that the United States may be made a party to a water adjudication is the McCarran Amendment. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427; *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058; *United States v. Shaw*, 309 U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888; *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 8 L. Ed. 1001. The Government's propositions are as follows:

(1) The McCarran Amendment can be used only with respect to a general adjudication of a river sys-

tem in which all rights of all users are before the court; and the present proceeding does not involve (a) a general adjudication, (b) an entire river system, nor (c) all water users in the district.

(2) The United States has unadjudicated rights antedating the last adjudicative decree and the district court cannot give priorities to these rights prior to the date of the last adjudication.

(3) The district court has jurisdiction only to adjudicate rights arising out of Colorado law and the United States claims rights arising otherwise.

The following are considered as the "appropriation" states with respect to water adjudications: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Utah, Washington and Wyoming. With the exception of Colorado all of the appropriation states have a statewide system of adjudicating priorities or issuing permits for the use of water. Until 1969 Colorado throughout its history has been divided into water districts and adjudicated priorities have been determined within each district. In 1969 the General Assembly of Colorado adopted Senate Bill 81 amending C.R.S. 1963, 148-21-1 *et seq.* which consolidates the 70 water districts of the state into seven divisions, each of which embraces an entire river drainage area within the state. The water adjudication here involved was commenced prior to the adoption of this amendment. There may be some question (which we do not decide) as to whether any further proceedings in the district court will be under the statutes existing before or after this amendment. However, we regard this as immaterial to the jurisdictional question presented. Except as expressly stated otherwise, our comments with respect to Colorado water laws will be with respect to those in existence prior to the 1969 amendment.

As the Government points out, priorities to the use of water are established by decrees of our district courts in the several water districts. Under our statutes there can be an original adjudication culminating in a decree fixing these priorities. Thereafter there can be a supple-

mental adjudication to establish priorities to the use of water not decreed in the original proceedings. There is no limit to the number of successive supplementary proceedings that may be had. The earliest priority granted in any supplemental adjudication must be later than the last priority established by the next preceding adjudication. *Hardesty Co. v. Arkansas Valley Co.*, 85 Colo. 555, 277 P. 763. Those appropriating water within the water district involved who were not served personally or by mail with notice of the proceedings are barred from attacking a decree after the lapse of two years. Those outside the water district may bring an action to adjust priority rights as between different districts within four years from the time of rendition of a decree having an effect thereon. C.R.S. 1963, 148-9-16 and 17. In practically all of the districts in Colorado, prior to the adoption of the McCarran Amendment in 1952, there had been not only original adjudications but supplementary adjudications.

I

CONGRESSIONAL INTENT

We address ourselves first to the question as to whether it was the intent of Congress that the "adjudication of rights" set forth in the McCarran Amendment includes water adjudications in Colorado. As a preface to this consideration it should be mentioned at the outset—as is later a subject of this opinion—that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights to the use of water and of the relative priorities of those rights to other water rights.

Water in any area is a vital commodity. A great part of the agricultural lands in the appropriation states can be productive only with the use of water for irrigation. Each state has control of the use and priority of use of water, not only for irrigation, but for domestic, municipal and industrial purposes.

The trend of Congressional legislation has been to require the United States to be in the position of any other

claimant to water rights. The Desert Land Act of 1877 made all non-appropriated waters from non-navigable sources upon the public lands "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." 43 U.S.C. § 321.

"The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. . . . If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356.

A part of the Reclamation Act in effect since 1902 reads:

"Vested rights and State laws unaffected: Nothing [in this chapter] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions [of this chapter], shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof." 43 U.S.C. § 383.

The McCarran Amendment was adopted during the second session of the 82nd Congress in 1952. Its language was taken from S. 18, which was introduced in the first session of that Congress in 1951. On April 25, 1951 a member of the Denver Bar testified at a committee hear-

ing as to the nature of water adjudications in Colorado (pages 27 and 28 of Hearings Before A Sub-committee Of The Committee On The Judiciary, United States Senate Eighty-Second Congress, First Session, On S. 18, A Bill To Authorize Suits Against The United States To Adjudicate And Administer Water Rights). He explained how water rights of the City of Denver have been adjudicated in at least seven districts. This brought clearly to the committee's attention the characteristics of the Colorado system as distinct from those of other states.

The report of the Senate Judiciary Committee, prepared as a result of these hearings, after quoting from *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed 525, stated:

"It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State.

"It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equita-

ble use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." Senate Calendar No. 711, Report No. 755, September 17, 1951.

H. R. 7289 was a House appropriation bill in the second session of the 82nd Congress. After original action by the House of Representatives, the United States Senate added to it the McCarran Amendment. The bill as so amended came before the House in July 1952. Congressman Rooney of New York moved to strike the amendment and read a communication addressed to him by the Quartermaster General of the United States Marine Corps, a portion of which stated:

"The effect of such legislation to give a blanket waiver by the United States of its immunity from suit in actions of this kind, opens the way for piecemeal adjudications of water rights in the various State courts, with the United States compelled to defend itself in a multiplicity of actions." Congressional Record—House—July 4, 1952, p. 9445.

Following Mr. Rooney's remarks his motion to strike the amendment lost with all four of Colorado's Congressmen voting "Nay."

Many river systems originate around the Continental Divide in Colorado, collect a substantial part of their flow in Colorado, provide water for the irrigation of Colorado lands and Colorado's domestic, municipal and industrial uses—as adjudicated by our district courts—and flow into Colorado's seven neighboring states. Some of these rivers are the South Platte, Arkansas, Rio

Grande, San Juan, Colorado, White and Yampa, flowing from Colorado to Wyoming, Nebraska, Kansas, Oklahoma, New Mexico, Arizona and Utah.

Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.

The foregoing is only a portion of the history and record which leads us to the conclusion that Congress intended to include the water adjudicative procedure of Colorado among the suits in which sovereign immunity of the United States would be waived. See *In re Greenriver Drainage Area*, 147 F. Supp. 127 and Vol. 1 of the Study of Development, Management and Use of Water Resources on the Public Lands Prepared for the Public Land Law Review Commission, pp. 189-195.

II

A GENERAL ADJUDICATION

The Government argues that the McCarran Amendment relates only to a "general adjudication" and that a supplementary adjudication is not a "general adjudication." The term "general adjudication" is not used in the statute—rather there we find "adjudication of rights." However, the attorneys for the United States point to the use of the term "general adjudication" in *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15. More thorough treatment of the facts and question presented is contained in the decision of the United States Court of Appeals reviewed in *Dugan, sub nom State v. Rank*, 293 F.2d 340. This was an action brought by some, but not all, of the users of water of the San Joaquin River in California to enjoin the United States and officials of the Bureau of Reclamation from storing and diverting water of that river. In *Dugan* Mr. Justice Clark stated, "Rather than a case involving a general adjudication

* * *, it is a private suit to determine water rights solely between respondent and the United States and the local Reclamation Bureau officials." *State v. Rank, supra*, was affirmed. In it the Court of Appeals had stated:

"The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one 'for the adjudication of rights to the use of water of a river system' within the meaning of § 666.

"(2) There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated."

Supplementary water adjudications in Colorado throughout the history of the state have been referred to as "general adjudications." The use of the term in *Dugan*, particularly considering the above quoted language of *State v. Rank, supra*, does not bolster the Government's contention. In fairness, it should be stated that counsel for the United States have combined with the term "general adjudication" additional clauses to the effect "of an entire river system in which all water users are joined." We proceed to the subject of "entire river system" immediately. Later in this opinion, in connection with our discussion of the adequacy of relief to the United States under Colorado law, we will address ourselves to the matter of other parties necessary to the proceeding.

III

RIVER SYSTEM

The Government has stressed repeatedly that an "entire river system" must be involved in order for the McCarran Amendment to be invoked. It urges that District

37 does not embrace an "entire river system." The McCarran Amendment does not contain the word "entire," but rather reads, "adjudication of rights to the use of water of a river system."

An *entire* river system well could mean all of a river and its tributaries above the place of discharge into the ocean. In the case of the Colorado River it would involve water flowing and appropriated in the states of Colorado, Utah, New Mexico, Wyoming, Arizona, Nevada and California. A court of one state cannot adjudicate the rights of ditches diverting water in another state. *Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P.2d 476. Such an interpretation as urged by the Government would confine the operation of the McCarran Amendment solely to those rivers arising and remaining entirely within the boundaries of one state. Obviously this was and is not the purpose, intent and effect of the Amendment.

It may be that here the United States wished to infer that the McCarran Amendment relates to proceedings in the other western states which have state-wide adjudications, but not to Colorado because of its segmentary water districts. The Little Snake River is in northwestern Colorado. It crosses into Wyoming and after a few miles returns to Colorado, emptying eventually (still in Colorado) into the Yampa River. Under the proposition just mentioned, Wyoming could bring the United States into adjudication of waters appropriated from the small portion of the Little Snake in that state; but Colorado could not do the same as to the much greater portion of the stream within its boundaries.

It is obvious that a state-wide adjudication can be just as fragmentary as that of a water district. At most, the differences are matters of degree. Therefore, we conclude that a proceeding under C.R.S. 1963, 148-9-7 in Water District 37—or any other water district—constitutes an adjudication of rights to the use of water of a *river system* contemplated by the McCarran Amendment. The testimony of the Denver attorney mentioned earlier supports Congressional intent in this respect.

With respect to the Government's argument that the same river may flow through more than one water dis-

trict, attention is directed to *Ft. Lyon Canal Co. v. Arkansas Valley S. B. & I. L. Co.*, 39 Colo. 332, 90 P. 1023. It was there said:

"Ample provision is made for the protection of the rights of parties to proceedings in the same district, but none of the provisions relating to this class relate to appropriators in different districts, as between each other. As to these, it was necessary for the orderly distribution of water, that the decrees in the different districts should be *prima facie* binding, but in order to protect their rights, as between each other, a period was given within which actions might be instituted to settle and adjust such rights. For this purpose, §§ 2434 and 2435 [Mills' Ann. Stats.] were enacted. Thereby opportunity was afforded to adjust such rights by an independent action, but, wisely, the period within which such an action could be commenced was prescribed; otherwise, rights as between appropriators of water in different districts where rights have been adjudicated, under the statutory proceedings, would remain unsettled indefinitely."

The provisions of §§ 2434 and 2435 as mentioned are the same as C.R.S. 1963, 148-9-17. With this correlation between districts under our statutes and with the creation of a division for each river by the 1969 amendment (C.R.S. 1963, 148-21-1 *et seq.*), the same practical result can be obtained in adjudication of rights under Colorado statutes as under the state-wide systems of other states.

IV

APPROACH TO THE ADJUDICATION OF WATER RIGHTS OF THE UNITED STATES

The remainder of the propositions asserted by the Government (as outlined early in this opinion) might be characterized as follows: If the state court in Colorado has jurisdiction over the United States, how and why can it grant the relief the United States would desire with respect to its water rights? In oral argument counsel

for the Government indicated if there were a satisfactory answer to that question, the United States might not be so loathe to submit itself to the jurisdiction of our state courts. He also gave the distinct impression that he would be most surprised if we produced a ruling which would overcome the trepidation of the Justice Department to see federal water rights under the state jurisdiction. Whether or not we mitigate the sovereign reluctance, we hold that under its plenary power a Colorado district court can make the relative rights of the United States a subject of its decree and can bring under its jurisdiction additional necessary parties in order to make such a decree fully valid, effective and enforceable. Before elaborating on this declaration, we deem it advisable to discuss some of the features and problems involved—or perhaps to be involved—in any decretory approach to the water rights of the United States in Colorado, which must be confronted someday whether in our state courts or in a federal forum.

In the district court the United States filed a memorandum supporting its motion to dismiss. It there made the following statement concerning its claims to the use of water:

“The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

“The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the pur-

pose of said withdrawal with a priority of August 25, 1905.

"In addition to our general reserved right, the United States will claim various specific uses, as follows:

"(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

"(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

"(c) 10 C.F.S. for the Minturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S $87^{\circ} 25'W$, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

"(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S $75^{\circ} 31'W$, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

"(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time."

In its application here, the United States makes the statement, "The court had no jurisdiction to adjudicate

rights other than those arising under Colorado law, but the United States claims rights otherwise arising." We are not sure whether by this statement the United States asserts that none of its rights have arisen under Colorado law. For the purpose of our discussion we will assume that it claims both (a) water rights reserved in connection with the withdrawal of public lands and which it asserts have not arisen under Colorado law and (b) appropriations arising under Colorado law (such as possibly may be the case as to water diverted by the Nelson Ditch mentioned in its memorandum).

V

RESERVED RIGHTS

The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially antedating several of the supplementary decrees in Water District 37 under the authority of *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542; *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L. Ed. 1215; *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136.

In contrast, counsel for the intervenor Central Colorado Water Conservancy District contend that the United States has no rights whatsoever except any that it might have acquired in the same manner as an individual. In support of this they cite Article XVI, §§ 5 and 6 of the Colorado constitution and *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220. These sections were placed in the constitution at the time it was prepared under the enabling act of Congress. Section 5 and a portion of Section 6 read as follows:

"Section 5. Water of streams public property.—
The water of every natural stream, not heretofore

appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Section 6. Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *"

In *Stockman* this court stated:

"This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, non-navigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its

sovereign capacity. We therefore find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

The authorities cited by the United States are not directly in point so far as its rights in Colorado are concerned. *Arizona v. California*, *supra*, involves claims of the United States on behalf of Indian reservations and other withdrawn lands, most if not all of which were created or withdrawn prior to the time Arizona was admitted into the Union in 1912. Furthermore, Arizona has never had a provision in its constitution declaring proprietorship of water as does the Colorado constitution. In *Arizona v. California* it was said:

"Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845), and *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no

doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

Certainly this is not authority to refute the contention that, by reason of the provisions of Colorado's constitution as originally adopted, the United States surrendered its right in the future to reserve water.

In *Federal Power Commission v. Oregon*, *supra*, the Commission had issued to a power company a license to construct a hydro-electric plant, including a dam across a navigable stream. The dam was to be located in part upon an Indian reservation and the remainder upon lands long before withdrawn for power purposes. The project did not involve any permanent diversion of water as the entire flow of the river would run through or over the dam into the natural bed of the stream. It was held that the Federal Power Act was applicable to the license and a license from the state was not necessary. Again, this case is not direct authority for the answer sought here in Colorado.

Winters v. United States, *supra*, involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union "upon an equal footing with the original States" (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union.

The *United States v. Rio Grande Dam & Irrig. Co.*, *supra*, involved acts within the Territory of New Mexico prior to the time New Mexico became a state. It was there stated:

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the con-

tinued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Here, instead, we are dealing with a non-navigable stream and instead of having an "absence of specific authority from Congress," the question is what was the specific authority from the United States in its recognition of the Colorado constitution.

"In sharp contrast, however, stand federal rights under the reservation doctrines, which are the subject of mystery, whose true nature can be unveiled only through the search of the few obscure instances wherein they have been adjudicated." The foregoing is from the study submitted to Public Land Law Review Commission, *supra*, P. S-13.

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. We do say at this time that, except for *Stockman v. Leddy, supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound.

VI

WATER APPROPRIATIONS OF THE UNITED STATES UNDER STATE LAW

As already mentioned, the United States has not been a party in any previous general adjudication in District

37. In its brief the Government cites Colorado statutes and our decisions under which decrees in water adjudications cannot be attacked after four years and in a subsequent water adjudication a priority cannot be given to a use of water prior to the date of the last adjudicated decree. It quotes from *Arizona v. California*, 298 U.S. 558, 56 S. Ct. 848, 80 L. Ed. 1331 that "no decree rendered in its absence can bind or affect the United States * * *." The brief continues:

"It is self-evident that supplemental water adjudications are not actions to which the United States has consented. It would be absurd to hold that the United States is bound by prior adjudications to which it was not a party and is thus now bound by proceedings in which it cannot have its rights adjudicated. Such a holding would convert 43 U.S.C. Sec. 666 into an instrument of injustice that would destroy the rights of the United States. It is for this reason that 43 U.S.C. Sec. 666 consents only to an adjudication in which all the rights of all users are before the court."

The quoted language in *Arizona v. California* was not made in connection with an adjudication of water rights by a state court and here again we are going to wait until the matter is argued more fully and specifically before making a determination as to whether this applies to Colorado water adjudications. Offhand, we are inclined to believe that it does apply. In *Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P.2d 476 there was involved water appropriated in Utah from Rock Creek, which arises in Utah, flows into Colorado, and then returns to Utah. The question was whether Utah users were bound by a Colorado adjudicative decree more than four years old. This court held that they were not and in this opinion Mr. Justice Stone wrote:

"However, the decree can speak only as to matters within the jurisdiction of the court, and where the court in such a statutory proceeding attempts to determine matters beyond its competence, its decree, as to such matters, is not conclusive. 'If the

court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the court had jurisdiction of the parties and of the subject matter.' *People ex rel. v. Burke*, 72 Colo. 486, 212 Pac. 837. So where the court by its decree attempted to adjudicate the ownership of the water, it was held that, 'In so far as this decree purports to settle and fix relative rights of individual users and consumers of water through said ditch, it is ineffectual.' *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345. And, to the extent a decree is beyond the authority of the court, it cannot be made valid by any rule of *res judicata* or any statutes of limitation. It is no more effectual after four years, than before."

It well may be that the same principle should be applied to appropriations made by the United States which have not been included in previous adjudications to which the United States was not a party.

VII

JURISDICTION OVER THE WATER CLAIMS OF THE UNITED STATES

We now return to the proposition asserted earlier that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights and relative priorities. For the purpose of our holding in this respect we make the following three assumptions *arguendo*: (1) The United States has reserved water rights in Water District 37 initiated prior to more recent general adjudication decrees in that district; (2) The United States has acquired rights to the use of water under Colorado law and such rights were initiated prior to the decrees just mentioned; and (3) The United States is entitled to a decree that its rights to the use of water are the same as if each of those rights had been awarded priorities in a water adjudication next following the initiation of the right. We repeat—these are assumptions *arguendo*—not determinations.

Water rights in Colorado are of the greatest importance to the welfare and economy of the people of this state, and of considerable importance to the United States. There are about 2,700,000 acres of land under irrigation in Colorado. Of the 66½ million acres of land in Colorado, the United States has 36.4%—or about 24⅓ million acres—in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.

We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure—and this is equally true from the standpoint of the United States as well as Colorado and its citizenry. The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction. "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein * * *." Colo. Const. art. VI, § 9(1). We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration.

The following remarks of Professor Karl N. Llewellyn are apt in this situation:

"But a court must strike to make sense *as a whole* out of our law *as a whole*. It must, to use Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the

other music of the legal system." Llewellyn "Remarks on the Theory of Appellate Decision" etc., 3 Vanderbilt L. Rev. 395.

Moreover, there are statutes which appear to recognize this jurisdiction which we hold is plenary:

"For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between owners and claimants of water rights drawing water from the same source within the same water district, and all other questions of law and questions of right growing out of, or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the county in which said water district exists * * *." C.R.S. 1963, 148-9-2.

"It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state." C.R.S. 1963, 148-21-2(1) being the Water Right Determination and Administration Act of 1969.

For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights. Of particular significance was the letter of the Acting Assistant Secretary of the Interior to the Chairman of the Committee on the Judiciary as to the McCarran Amendment under date of August 3, 1951. This is made a part of the Committee's Report mentioned earlier on pages 7 and 8. Senate Calendar No. 711, *supra*. A portion of the letter reads:

"The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U.S. 564 (1908) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U.S.C. 661), July 9, 1870 (16 Stat. 218, 43 U.S.C. 661), and March 3, 1877 (19 Stat. 377, 43 U.S.C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with varying degrees of accuracy, to be the 'owner' of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter."

See also the discussions in 19 Stan. L. Rev. 65, *et seq.*; 20 Stan. L. Rev. 1187, *et seq.* and the Study submitted to the Public Land Law Commission, pp. 189-195, mentioned above. We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to

withhold reserved rights from the light of day and adjudication.

VIII

NOTICE

In its appearance before the district court the City and County of Denver moved for an order providing for the notification of all appropriators in Water District 37 in order that the priorities of the United States' claims to water might be adjudicated. It filed a brief supporting its belief that the court can do this under the portion of C.R.S. 1963, 148-9-7 which reads, "if the proceeding be supplemental as to one class of rights, for example, irrigation, and original as to another class, for example non-irrigation, the service shall be necessary on those whose rights have already been adjudicated." The claims of the United States, says Denver, is another class of rights under that statute. The United States and most of the other parties here disagree. As we hold that the district court has jurisdiction by reason of its plenary powers, it follows that the court need not have a statutory provision for notice. After the United States has filed its statements of claim in the district court, including the priority dates it seeks, the court then can determine which claimants of adjudicated rights need be given notice and can specify the manner that notice shall be given. Obviously, notice should be directed to those who might be adversely affected if the prayers for relief of the United States were granted.

Undoubtedly it would be preferable to have a statute setting forth the manner of notice in the circumstances under consideration, and it well may be that legislation in other respects might be helpful in implementing the jurisdiction of our courts over the United States. But although desirable, legislation is not necessary to implement the adjudication of rights under this opinion nor to protect the rights of all parties who may be involved, including the United States.

IX

WATER RIGHT DETERMINATION AND
ADMINISTRATION ACT OF 1969

Senate Bill 81 adopted in 1969 (C.R.S. 1963, 148-21-1 *et seq.*) was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this matter. We do make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

Rule discharged.

IN THE SUPREME COURT OF THE STATE OF
COLORADO

23819

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE HAROLD A. GRANT, RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS, CEN-
TRAL COLORADO WATER CONSERVANCY DISTRICT, AND
THE NEW JERSEY ZINC COMPANY, INTERVENORS

ORIGINAL PROCEEDING

On consideration of the pleadings and arguments here-
in, it is hereby ordered that the rule to show cause here-
tofore issued in this action be, and it hereby is, dis-
charged.

By the Court. September 15, 1969.

SUPREME COURT OF THE UNITED STATES

No. 1178, October Term, 1969

UNITED STATES, PETITIONER

v.

DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO ET AL.

ORDER ALLOWING CERTIORARI—Filed March 30, 1970

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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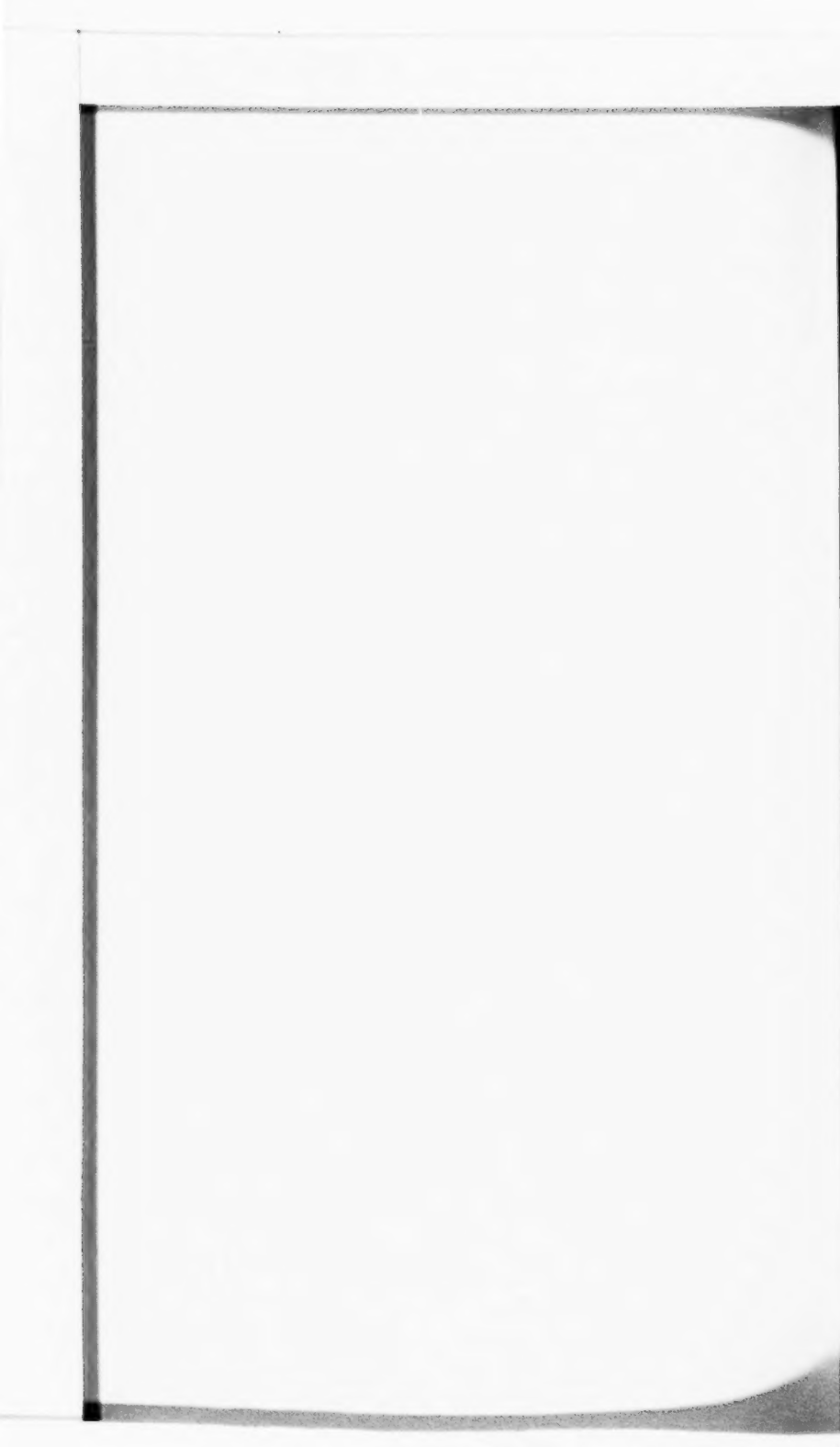
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY
OF EAGLE AND STATE OF COLORADO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

The Solicitor General, on behalf of the United States, petitions that a writ of certiorari be granted to review the Judgment of the Supreme Court of the State of Colorado entered in this case on September 15, 1969.

OPINION BELOW

The opinion of the Colorado Supreme Court (Appendix A, *infra*, pp. 19-48) is reported at 458 P. 2d 760.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 15, 1969 (Appendix B, *infra*, p. 49). On December 8, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including February 12, 1970. The

jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).¹

QUESTIONS PRESENTED

1. Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States for adjudication of its reserved water rights not predicated on State law.

2. Whether the congressional consent to suits against the United States "for adjudication of rights to the use of water of a river system" extends to a supplemental adjudication proceeding in one of some 70 water districts in Colorado which encompasses only a tributary of the Colorado River.

STATUTE INVOLVED

43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) provides:

Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs—

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead

¹ A discussion relating to the finality of the judgment below for purposes of review by this Court is included at a later point (*infra*, pp. 7-9).

that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

The United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37 in the Eagle County District Court in Colorado. Water District 37 is one of 70 water districts in Colorado, and encompasses "all lands lying in the state of Colorado irrigated by water taken from the Eagle river and its tributaries" (Colo. Rev. Stat., 148-13-38 (1963)). The Eagle River is a tributary of the Colorado River.

The United States claims two types of water rights in Water District 37: *appropriative* rights acquired pursuant to State law, and *reserved* rights based on federal law, resulting principally from withdrawals of land from the public domain. Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601. Most of the reserved

rights claimed by the United States in Water District 37 are for the White River National Forest, which was withdrawn from the public domain by Presidential Proclamation on August 25, 1905 (34 Stat. 3144).

In response to its joinder as a defendant in the State court proceeding,² the United States moved for dismissal as to it, on the ground of lack of jurisdiction. When that motion was denied by the district court, the United States applied to the Colorado Supreme Court for a writ of prohibition. The first ground of that application was that 43 U.S.C. 666 consents only to a suit wherein the rights of all water users within a river system are before the court, and that a supplemental adjudication proceeding in Water District 37 is not such a suit because Water District 37 does not embrace an entire river system. Moreover, the United States contended that, since the jurisdiction of Colorado district courts is limited by State law to the adjudication of water rights arising

² It should be noted that under Colorado law (at least until this case), the only water rights determined in a supplemental adjudication proceeding are those acquired by appropriation since the last adjudication in that water district (Colo. Rev. Stat. 148-9-7 (1963)). The earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding adjudication (Colo. Rev. Stat., 148-9-13(3) (1963); *Hardesty Reservoir, Canal & Land Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 85 Colo. 555). The last water adjudication decree in Water District 37 was entered on February 21, 1966. The United States was not a party to that or any prior proceeding relating to Water District 37. The priority dates claimed by the United States for both the rights based on State Law and the reserved rights are earlier than the latest priority decreed in the last adjudication in Water District 37.

under Colorado law (appropriative rights), the district court could not adjudicate water rights of the United States based on reservations of the public domain (App. 22).³

The Colorado Supreme Court in an *en banc* opinion concluded that the United States was subject to the jurisdiction of the district court, and accordingly discharged its rule to show cause. The grounds for its decision were that (1) the adjudication proceeding in Water District 37 is an "adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. 666; (2) the United States has consented, by Section 666, to adjudication of its reserved rights; and (3) the Colorado district courts have plenary jurisdiction, independent of State statute, to adjudicate rights of the United States based both on appropriations under State law and on withdrawals from the public domain, and to bring all parties necessary to such an adjudication before the Court (App. 31, 33, 45). The court reserved decision on whether the United States was bound by prior adjudications in Water District 37 to which it was not a party (App. 40).

³ In addition, the United States asserted that, since Colorado law requires that the earliest priority date assigned in a supplemental adjudication be later than the last priority date assigned in the preceding adjudication, neither reserved nor appropriative rights of the United States with earlier priority dates can be determined in a supplemental adjudication proceeding.

The government did not expressly raise the further point that Section 666 does not consent to the adjudication of reserved rights. However, in light of the Colorado Supreme Court's square holding that such rights are within the consent granted by Section 666, and its indication that in its view the reserved rights doctrine is of doubtful validity in Colorado, the question is now properly presented for review.

While the court did not expressly decide that the United States has no reserved water rights in Colorado,⁴ the thrust of its opinion is that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights (*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435) were not determinative (App. 37-40). It suggested that a decision that the United States has reserved rights in Colorado would require the overruling of *Stockman v. Leddy*, 55 Colo. 24, where it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,⁵ had lost any right to

⁴ The court stated (App. 40): "We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. * * *"

⁵ Article XVI, Section 5, of the Colorado Constitution, provides:

Section 5. Water of streams public property—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

assert thereafter water rights in Colorado except those acquired by appropriation pursuant to State law (App. 40).

THIS COURT HAS JURISDICTION

1. As an initial matter, we turn to the question of this Court's jurisdiction. Since the instant case comes from a State court, an express statutory requirement of finality is applicable under 28 U.S.C. 1257. The decision below admittedly did not terminate the entire litigation, for the essence of the Colorado Supreme Court's holding is that the United States is subject to suit, and thus must participate as a party defendant, in the ongoing proceeding in the State district court. Nonetheless, it is our view that the judgment of the Colorado Supreme Court asserting State court jurisdiction over the United States for the adjudication of water rights is final for purposes of review by this Court under 28 U.S.C. 1257(3).

Where the decision below has not conclusively disposed of the whole controversy on the merits, this Court has held that the finality requirement of 28 U.S.C. 1257 is still satisfied if the issue resolved is separable from the merits and is not subject to further review in the state courts. *E.g.*, *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-558; *Construction Laborers v. Curry*, 371 U.S. 542, 548-552; *Clark v. Williard*, 292 U.S. 112, 117-119; *Hudson Distributors v. Eli Lilly & Co.*, 377 U.S. 386, 389, n. 4; *Madriga v. Superior Court*, 346 U.S. 556, 557, n. 1; *Pan Ameri-*

can Corp. v. Superior Court, 366 U.S. 656, 657-658.*

More specifically in point is the holding in *Construction Laborers v. Curry*, *supra*. There this Court held that a judgment of the Georgia Supreme Court authorizing a temporary injunction was final for purposes of review because the issue decided—whether Georgia courts had jurisdiction to enter the injunction—was separate from the merits and was not subject to further review in the Georgia courts. In that case the Court stated (371 U.S. at 548):

Respondents would nevertheless have us dismiss this case as beyond our appellate jurisdiction since 28 U.S.C. § 1257 limits our authority to the review of final judgments of state courts and since the Georgia Supreme Court authorized the issuance of only a temporary injunction, thus leaving a permanent order still to be issued after further hearings in the trial court. But we believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. * * * What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board.

* See also *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1, 15 L. Ed. 2d 39 (opinion by Mr. Justice Goldberg as Circuit Justice).

Similarly, in *Mercantile National Bank v. Langdeau, supra*, this Court held final for jurisdictional purposes a judgment of the Supreme Court of Texas ruling that, where suit was brought in a Texas court against a national bank, a State rather than a federal statute controlled the question of proper venue. This Court observed (371 U.S. at 558):

This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

The situation is substantially the same here. The Colorado Supreme Court has ruled, over the objections of the United States, that the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United States, including its reserved rights. Since this issue is clearly separable from the merits of the litigation pending in the State district court (the relative rights and priorities of the claimants of water rights in Water District 37), and is not subject to further review in the Colorado courts, the judgment is final for purposes of this Court's jurisdiction under 28 U.S.C. 1257(3).

REASONS FOR GRANTING THE WRIT

The decision below poses substantial hazards to the effective utilization of federal lands in the West. The net effect of that decision may well be to deprive the United States of valuable water rights for use in connection with the development of the public domain. The United States owns approximately 731,000,000 acres of land in the 17 contiguous western States and Alaska. U.S. Dept. of Interior, *Public Land Statistics*, p. 11 (1966). Water is obviously essential to the utilization and administration of land in these arid and semi-arid States, as well as to a variety of other government projects and programs. In this regard, the United States depends both on water rights acquired pursuant to State law and on reserved rights based on withdrawals from the public domain. Until now the validity of the latter source has scarcely been open to question. See, *e.g.*, *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601.

The decision below threatens the inviolability of the federal government's reserved water rights. Courts in other western States may well be guided by the example set in this regard by the Colorado courts. If, as the decision below portends, the rights of the United States to use the water on its public lands which have been withdrawn for various purposes are to be subjected to the vagaries of inconsistent State laws, the implications for any public-oriented program of conservation and land development are indeed serious. The magnitude of the problem is indicated by the fact that about 443,000,000 acres have

been withdrawn from the public domain for use as Indian reservations, national parks, national forests, national recreation areas, national monuments, etc.⁷ It is not an exaggeration to suggest that the decision below raises serious questions about the nature and scope of the federal government's water rights on all these public lands.

The appropriation system of water law followed by Colorado is prevalent in the western States.⁸ It is fundamental to this system of water law that the rights of users of water from the same source are carefully described as to priorities, amounts and uses in adjudication proceedings. The only statute by which the United States has given its consent to be made a party to such adjudication proceedings is 43 U.S.C. 666. For that reason, the reach of the consent to suit given by the United States in this statute, which has never been definitively construed by this Court on this point, is of great importance. This is particularly so at a time when increasing demands on the Nation's limited water supplies by a rapidly expanding population make it certain that the problems arising under the statute, such as those involved in this litigation, will be recurring ones.

⁷ Wheatley, *Study of Withdrawals and Reservations of Public Domain Lands Prepared for the Public Land Law Review Commission*, App. G, Table G.1 (1968).

⁸ Alaska and eight of the western States, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, following the strict appropriation system, or "Colorado doctrine." The other nine States have systems which contain elements of both the appropriation and riparian systems. 5 Powell, *The Law of Real Property*, Sec. 734, pp. 445-446 (1968).

1. The Colorado Supreme Court's decision that the lower State court has jurisdiction to "adjudicate" the reserved water rights of the United States is erroneous and contravenes the intent of Congress in enacting 43 U.S.C. 666. If allowed to stand, the decision below will expose the United States to hazards of litigation regarding its water rights that Congress never contemplated, and as a result may hinder the use of withdrawn public lands for their intended purposes.

Thus, if Section 666 requires the United States to submit its reserved rights to adjudication each time it is made a party to a State court water adjudication proceeding (assuming the joinder would be proper as to rights acquired under State law), it would be burdened with asserting its extensive reserved rights in a multitude of forums or risk losing them by operation of the principle of *res judicata*. See *Green River Adjudication v. United States*, 17 Utah 2d 50.⁹ 43 U.S.C. 666 does not, however, constitute consent by the United States to have its reserved water rights adjudicated under inconsistent State laws. Rather, a reasonable construction of the pertinent statutory language shows that Congress intended the consent to suit pursuant to 43 U.S.C. 666 to extend only to suits for the adjudica-

⁹ A decision of this Court excluding reserved rights from such proceedings, as Congress intended, would eliminate this risk. But such exclusion would not preclude the United States from continuing the practice it has followed in the past of listing and seeking a recognition in those adjudication proceedings to which it is otherwise properly a party of its existing and estimated future requirements for water claimed under the reserved rights doctrine in the area involved.

tion of rights acquired by the United States under State law.¹⁰

The legislative history of the statute supports the conclusion that the consent of the United States does not extend to the adjudication of its reserved rights. See S. Rep. No. 755, 82d Cong., 1st Sess., p. 5 (1951), noting that "Congress has not removed the bar of immunity even in its own courts in suits wherein water rights *acquired under State law* are drawn in question. The bill was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." [Emphasis added.] See also 97 Cong. Rec. 12947-12948 (remarks of Sen. McCarran).

Nothing in the interpretation that the consent given by 43 U.S.C. 666 extends only to suits for the adjudication of the water rights of the United States acquired pursuant to State law is inconsistent with the provision of the statute that "* * * [t]he United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty * * *."

¹⁰ Properly viewed, the statutory phrase, "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise," limits the scope of the statute to rights derived from State law. The only words in that phrase which could include other types of rights, such as reserved rights, are "or otherwise." Application of the rule of *ejusdem generis* leads to the conclusion that those words do not include rights not derived from State law.

If the State courts have jurisdiction to "adjudicate" the reserved rights of the United States, it might be argued that by the quoted language Congress agreed that the United States would be bound by State law in all respects in adjudications to which it is joined under the statute. While we believe such an argument is untenable, if the question is not disposed of now by this Court, it may be presented here again after several years of extended litigation.

The appropriation system of water law, upon which the laws of the western States are based, is essentially different from the concept of reserved water rights. Under Colorado law, to "adjudicate" means essentially to fix the amount and priority date of a water right by determining when, and in what quantity, water was diverted and applied to a beneficial use (Colo. Rev. Stat., 148-9-11, 13 (1963)). Such water rights are subject to loss through abandonment, and thus have characteristics that are incompatible with reserved rights, which arise automatically when lands are withdrawn from the public domain, have priority as of the dates of such withdrawals, and apply to future as well as existing uses. The Colorado Supreme Court's suggestion that the Colorado constitution precludes ownership by the United States of reserved rights in Colorado¹¹ is illustrative of the potential

¹¹ The court did not expressly decide that issue, and left it to the district court to decide whether to recognize the reserved rights claimed by the United States. However, in view

difficulties. But, as we have already noted, the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of withdrawal, and the suggestion thus conflicts with decisions of this Court. *Arizona v. California*, *supra*, 373 U.S. at 595-601; *Winters v. United States*, *supra*, 207 U.S. 564; see also *United States v. Ahtanum Irrigation District*, 236 F. 2d 321 (C.A. 9); *Burley v. United States*, 179 Fed. 1, 12-13 (C.A. 9).¹²

of the court's statement that a determination that the United States has reserved rights in Colorado would require the overruling of its prior decision in *Stockman v. Leddy*, *supra*, the result in the district court is a foregone conclusion. The district court is not going to overrule a decision of the Colorado Supreme Court in order to hold that the United States has water rights which are not recognized under Colorado law. And whether the United States has reserved rights in Colorado does not turn on any facts which must be found by the district court. The Colorado Supreme Court had before it all the facts necessary to decide the question (*i.e.*, the withdrawal order), and its refusal to do so merely procrastinates.

¹² The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution, which the Colorado Supreme Court, in *Stockman v. Leddy*, *supra*, construed to be an assertion of ownership of all unappropriated waters within its borders, is inconsequential. By passing the enabling act providing for Colorado statehood Congress intended only to authorize statehood, not to give up any of its rights with respect to the public domain (see Act of March 3, 1875, 18 Stat. 474).

In sum, if the consent of 43 U.S.C. 666 extends to adjudication of the reserved water rights of the United States, the way is open for the Colorado courts and the courts of the other western States to attempt to "adjudicate" those rights out of existence (see App. 24, 28, 43). Congress could not have intended that, for such a construction would effectively convert Section 666 from a statute merely consenting to suit to one effectively disposing of valuable property rights of the United States. To do this surely requires a clearer expression of congressional intent than is found in the words or background of Section 666. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404; *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116.

2. Similarly, the court below erred in holding that the United States may be joined under 43 U.S.C. 666 in a State court proceeding for the adjudication of water rights in one of Colorado's 70 water districts. The proceeding relating to Water District 37 is not one "for the adjudication of rights to the use of water of a river system or other source" within the meaning of Section 666. The courts have in general required that all parties claiming rights to the use of water of a river system or other source be before the court, and that the suit be one for an *inter sese* determination of all claimed rights. In *Dugan v. Rank*, 372 U.S. 609, 618, this Court spoke of "a *general* adjudication of 'all of the rights of various owners on a given stream.'" And in *Miller v. Jennings*, 243 F. 2d 157, 159 (C.A. 5), the court said:

The United States has not given its consent to be joined as a defendant in every suit involv-

ing water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. * * * ¹³

Assuming here that the proceeding in Water District 37 is for an *inter sese* adjudication of all water rights claimed in Water District 37, and that the district court can bring all necessary parties before it, the question remains whether Water District 37 includes a "river system" within the meaning of the statute. We believe it does not. Water District 37 is only one of 70 water districts in Colorado (see note 15, *infra*). And the United States has been joined in similar proceedings in Water Districts 36, 51 and 52 in Colorado,¹⁴ as well as in other States, including Utah, Idaho, New Mexico and Washington. More such suits can be expected to follow if the Colorado Supreme Court's decision is allowed to stand. Certainly Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate rights as to only small portions of recogniz-

¹³ See also the opinion of the court of appeals, *sub nom.* *State v. Rank*, 293 F. 2d 340, 346-348 (C.A. 9), which was affirmed in *Dugan v. Rank*, *supra*; *State of Nevada v. United States*, 279 F. 2d 699, 701 (C.A. 9); *City of China v. Superior Court of Orange Co.*, 255 Cal. App. 2d 747.

¹⁴ One of the intervenors in the instant proceeding, Central Colorado Water Conservancy District, stated in its brief that it is seeking to join the United States under 43 U.S.C. 666 to supplemental adjudication proceedings in Water Districts 7, 8, 9 and 23.

able river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread. Congress obviously had this in mind when it enacted 43 U.S.C. 666, and that provision should be construed accordingly.¹⁵

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1970.

¹⁵ On June 7, 1969, the Water Right Determination and Administration Act became effective in Colorado. The Act amends Colo. Rev. Stat. 148-21-1 *et seq.* (1963) by consolidating the 70 water districts into seven water divisions, each designed to include an entire river drainage basin. Water District 37 will be within Division 5, which includes the Colorado River and its tributaries, except the Gunnison River. The Act governs adjudication proceedings initiated after its effective date, but appears to give parties to actions pending at that time the option of proceeding under the new Act. However, since the Colorado Supreme Court found the Act to be immaterial to its decision (App. 22-23), it is not discussed in detail here. At all events, enactment of this statute does not detract from the importance of the question presented here, because it does not affect the problem of piecemeal adjudications in other western States.

APPENDIX A

No. 23819

(Filed in the Supreme Court of the State of Colorado,
September 15, 1969, Richard D. Turelli)

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE HAROLD A. GRANT, RESPONDENTS
THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS,
CENTRAL COLORADO WATER CONSERVANCY DISTRICT,
AND THE NEW JERSEY ZINC COMPANY, INTERVENORS

ORIGINAL PROCEEDING

En Banc—Rule discharged

Clyde O. Martz, Assistant Attorney General; Shiro Kashiwa, Assistant Attorney General; Lawrence M. Henry, United States Attorney; James L. Treece, United States Attorney; Warwick Downing II, Assistant United States Attorney; Roger P. Marquis, Attorney, Department of Justice; James W. Moorman, Attorney, Department of Justice; David Osborne, Attorney, Department of Justice; Attorneys for Petitioner,

Delaney and Balcomb, Kenneth Balcomb, Respondent, District Court and Judge thereof, and the Intervenor, The Colorado River Water Conservation Dis-

trict; George L. Zoellner, Glenn G. Saunders, Intervenor, City and County of Denver, acting by and through its Board of Water Commissioners; Miller and Ruyle, David J. Miller, Robert A. Ruyle, Alvin L. Steinmark, Intervenor, Central Colorado Water Conservancy District; Dawson, Nagel, Sherman & Howard, Don H. Sherwood, Raphael J. Moses, Intervenor, New Jersey Zinc Company; Attorneys for Respondents.

Mr. Justice Groves delivered the opinion of the Court.

This is an original proceeding in this court wherein the United States has asked for a writ prohibiting the district court from asserting jurisdiction over it in a supplemental water adjudication under C.R.S. 1963, 148-9-7. We issued a rule to show cause why the relief requested should not be granted.

The proceeding is in Water District 37 of the State of Colorado, which embraces the Eagle River and its tributaries. The Eagle River is a tributary of the Colorado River and is non-navigable. There have been a number of previous adjudications in this water district. The decree in the original adjudication was entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings.

The current proceedings were commenced by the Colorado River Water Conservancy District and it sought to make the United States a party under 43 U.S.C. § 666 (known as the McCarran Amendment) which reads in part as follows:

“(a) *Joinder of United States as Defendant; Costs.* Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears

that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"(b) *Service of Summons.* Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."

The United States moved the district court for dismissal as to it by reason of lack of jurisdiction. This motion was denied by the Honorable William H. Luby, the judge of the court, who has since retired. We have concluded that the district court has jurisdiction over the United States in these proceedings and that the motion was properly denied.

The propositions asserted by the United States are based upon the solid foundation that: (1) the United States cannot be subjected to the jurisdiction of any court without the consent of Congress; and (2) the only statute adopted by the Congress consenting that the United States may be made a party to a water adjudication is the McCarran Amendment. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427; *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058; *United States v. Shaw*, 309

U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888; *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 8 L. Ed. 1001. The Government's propositions are as follows:

(1) The McCarran Amendment can be used only with respect to a general adjudication of a river system in which all rights of all users are before the court; and the present proceeding does not involve (a) a general adjudication, (b) an entire river system, nor (c) all water users in the district.

(2) The United States has unadjudicated rights antedating the last adjudicative decree and the district court cannot give priorities to these rights prior to the date of the last adjudication.

(3) The district court has jurisdiction only to adjudicate rights arising out of Colorado law and the United States claims rights arising otherwise.

The following are considered as the "appropriation" states with respect to water adjudication: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Utah, Washington and Wyoming. With the exception of Colorado all of the appropriation states have a state-wide system of adjudicating priorities or issuing permits for the use of water. Until 1969 Colorado throughout its history has been divided into water districts and adjudicated priorities have been determined within each district. In 1969 the General Assembly of Colorado adopted Senate Bill 81 amending C.R.S. 1963, 148-21-1 *et seq.* which consolidates the 70 water districts of the state into seven divisions, each of which embraces an entire river drainage area within the state. The water adjudication here involved was commenced prior to the adoption of this amend-

ment. There may be some question (which we do not decide) as to whether any further proceedings in the district court will be under the statutes existing before or after this amendment. However, we regard this as immaterial to the jurisdictional question presented. Except as expressly stated otherwise, our comments with respect to Colorado water laws will be with respect to those in existence prior to the 1969 amendment.

As the Government points out, priorities to the use of water are established by decrees of our district courts in the several water districts. Under our statutes there can be an original adjudication culminating in a decree fixing these priorities. Thereafter there can be a supplemental adjudication to establish priorities to the use of water not decreed in the original proceedings. There is no limit to the number of successive supplementary proceedings that may be had. The earliest priority granted in any supplemental adjudication must be later than the last priority established by the next preceding adjudication. *Hardesty Co. v. Arkansas Valley C.*, 85 Colo. 555, 277 P. 763. Those appropriating water within the water district involved who were not served personally or by mail with notice of the proceedings are barred from attacking a decree after the lapse of two years. Those outside the water district may bring an action to adjust priority rights as between different districts within four years from the time of rendition of a decree having an effect thereon. C.R.S. 1963, 148-9-16 and 17. In adoption of the McCarran Acts in Colorado, prior to the Amendment in 1952, there had been not only original adjudications but supplementary adjudications.

CONGRESSIONAL INTENT

We address ourselves first to the question as to whether it was the intent of Congress that the "adjudication of rights" set forth in the McCarran Amendment includes water adjudications in Colorado. As a preface to this consideration it should be mentioned at the outset—as is later a subject of this opinion—that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights to the use of water and of the relative priorities of those rights to other water rights.

Water in any area is a vital commodity. A great part of the agricultural lands in the appropriation states can be productive only with the use of water for irrigation. Each state has control of the use and priority of use of water, not only for irrigation, but for domestic, municipal and industrial purposes.

The trend of Congressional legislation has been to require the United States to be in the position of any other claimant to water rights. The Desert Land Act of 1877 made all non-appropriated waters from non-navigable sources upon the public lands "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." 43 U.S.C. § 321.

"The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. . . . If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grant-

ees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356.

A part of the Reclamation Act in effect since 1902 reads:

"Vested rights and State laws unaffected: Nothing [in this chapter] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions [of this chapter], shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof." 43 U.S.C. § 383.

The McCarran Amendment was adopted during the second session of the 82nd Congress in 1952. Its language was taken from S. 18, which was introduced in the first session of that Congress in 1951. On April 25, 1951 a member of the Denver Bar testified at a committee hearing as to the nature of water adjudications in Colorado (pages 27 and 28 of Hearings Before A Sub-committee Of The Committee On The Judiciary, United States Senate Eighty-Second Congress, First Session, On S. 18, A Bill To Authorize Suits Against The United States To Adjudicate And Administer Water Rights). He explained how water rights of the City of Denver have been adjudicated in

at least seven districts. This brought clearly to the committee's attention the characteristics of the Colorado system as distinct from those of other states.

The report of the Senate Judiciary Committee, prepared as a result of these hearings, after quoting from *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525, stated:

"It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public water as provided in each such State.

"It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on the stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory

enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." Senate Calendar No. 711, Report No. 755, September 17, 1951.

H.R. 7289 was a House appropriation bill in the second session of the 82nd Congress. After original action by the House of Representatives, the United States Senate added to it the McCarran Amendment. The bill as so amended came before the House in July 1952. Congressman Rooney of New York moved to strike the amendment and read a communication addressed to him by the Quartermaster General of the United States' Marine Corps, a portion of which stated:

"The effect of such legislation to give a blanket waiver by the United States of its immunity from suit in actions of this kind, opens the way for piecemeal adjudications of water rights in the various State courts, with the United States compelled to defend itself in a multiplicity of actions." Congressional Record—House—July 4, 1952, p. 9445.

Following Mr. Rooney's remarks his motion to strike the amendment lost with all four of Colorado's Congressmen voting "Nay."

Many river systems originate around the Continental Divide in Colorado, collect a substantial part of their flow in Colorado, provide water for the irrigation of Colorado lands and Colorado's domestic, municipal and industrial uses—as adjudicated by our district courts—and flow into Colorado's seven neighbor-

ing states. Some of these rivers are the South Platte, Arkansas, Rio Grande, San Juan, Colorado, White and Yampa, flowing from Colorado to Wyoming, Nebraska, Kansas, Oklahoma, New Mexico, Arizona and Utah.

Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.

The foregoing is only a portion of the history and record which leads us to the conclusion that Congress intended to include the water adjudicative procedure of Colorado among the suits in which sovereign immunity of the United States would be waived. See *In re Greenriver Drainage Area*, 147 F. Supp. 127, and Vol. 1 of the Study of Development, Management and Use of Water Resources on the Public Lands Prepared for the Public Land Law Review Commission, pp. 189-195.

II

A GENERAL ADJUDICATION

The Government argues that the McCarran Amendment relates only to a "general adjudication" and that a supplementary adjudication is not a "general adjudication." The term "general adjudication" is not used in the statute—rather there we find "adjudication of rights." However, the attorneys for the United States point to the use of the term "general adjudication" in *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct.

999, 10 L. Ed. 2d 15. More thorough treatment of the facts and question presented is contained in the decision of the United States Court of Appeals reviewed in *Dugan, sub nom. State v. Rank*, 293 F. 2d 340. This was an action brought by some, but not all, of the users of water of the San Joaquin River in California to enjoin the United States and officials of the Bureau of Reclamation from storing and diverting water of that river. In *Dugan* Mr. Justice Clark stated, "Rather than a case involving a *general* adjudication * * *, it is a private suit to determine water rights solely between respondent and the United States and the local Reclamation Bureau officials." *State v. Rank, supra*, was affirmed. In it the Court of Appeals had stated:

"The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one 'for the adjudication of rights to the use of water of a river system' within the meaning of § 666.

"(2) There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated."

Supplementary water adjudications in Colorado throughout the history of the state have been referred to as "general adjudications." The use of the term in *Dugan*, particularly considering the above quoted language of *State v. Rank, supra*, does not bolster the Government's contention. In fairness, it should be stated that counsel for the United States have combined with the term "general adjudication" additional

clauses to the effect "of an entire river system in which all water users are joined." We proceed to the subject of "entire river system" immediately. Later in this opinion, in connection with our discussion of the adequacy of relief to the United States under Colorado law, we will address ourselves to the matter of other parties necessary to the proceeding.

III

RIVER SYSTEM

The Government has stressed repeatedly that an "entire river system" must be involved in order for the McCarran Amendment to be invoked. It urges that District 37 does not embrace an "entire river system." The McCarran Amendment does not contain the word "entire," but rather reads, "adjudication of rights to the use of water of a river system."

An *entire* river system well could mean all of a river and its tributaries above the place of discharge into the ocean. In the case of the Colorado River it would involve water flowing and appropriated in the states of Colorado, Utah, New Mexico, Wyoming, Arizona, Nevada and California. A court of one state cannot adjudicate the rights of ditches diverting water in another state. *Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P. 2d 476. Such an interpretation as urged by the Government would confine the operation of the McCarran Amendment solely to those rivers arising and remaining entirely within the boundaries of one state. Obviously this was and is not the purpose, intent and effect of the Amendment.

It may be that here the United States wished to infer that the McCarran Amendment relates to proceedings in the other western states which have statewide adjudications, but not to Colorado because of its

segmentary water districts. The Little Snake River is in northwestern Colorado. It crosses into Wyoming and after a few miles returns to Colorado, emptying eventually (still in Colorado) into the Yampa River. Under the proposition just mentioned, Wyoming could bring the United States into adjudication of waters appropriated from the small portion of the Little Snake in that state; but Colorado could not do the same as to the much greater portion of the stream within its boundaries.

It is obvious that a state-wide adjudication can be just as fragmentary as that of a water district. At most, the differences are matters of degree. Therefore, we conclude that a proceeding under C.R.S. 1963, 148-9-7 in Water District 37—or any other water district—constitutes an adjudication of rights to the use of water of a *river system* contemplated by the McCarran Amendment. The testimony of the Denver attorney mentioned earlier supports Congressional intent in this respect.

With respect to the Government's argument that the same river may flow through more than one water district, attention is directed to *Ft. Lyon Canal v. Arkansas Valley S. B. & I. L. Co.*, 39 Colo. 332, 90 P. 1023. It was there said:

“Ample provision is made for the protection of the rights of parties to proceedings in the same district, but none of the provisions relating to this class relate to appropriators in different districts, as between each other. As to these, it was necessary for the orderly distribution of water, that the decrees in the different districts should be *prima facie* binding, but in order to protect their rights, as between each other, a period was given within which actions might be instituted to settle and adjust such rights. For this purpose, §§ 2434 and 2435

[Mills' Ann. Stats.] were enacted. Thereby opportunity was afforded to adjust such rights by an independent action, but, wisely, the period within which such an action could be commenced was prescribed; otherwise, rights as between appropriators of water in different districts where rights have been adjudicated, under the statutory proceedings, would remain unsettled indefinitely."

The provisions of §§ 2434 and 2435 as mentioned are the same as C.R.S. 1963, 148-9-17. With this correlation between districts under our statutes and with the creation of a division for each river by the 1969 amendment (C.R.S. 1963, 148-21-1 *et seq.*), the same practical result can be obtained in adjudication of rights under Colorado statutes as under the statewide systems of other states.

IV

APPROACH TO THE ADJUDICATION OF WATER RIGHTS OF THE UNITED STATES

The remainder of the propositions asserted by the Government (as outlined early in this opinion) might be characterized as follows: If the state court of Colorado has jurisdiction over the United States, how and why can it grant the relief the United States would desire with respect to its water rights? In oral argument counsel for the Government indicated if there were a satisfactory answer to that question, the United States might not be so loathe to submit itself to the jurisdiction of our state courts. He also gave the distinct impression that he would be most surprised if we produced a ruling which would overcome the trepidation of the Justice Department to see federal water rights under the state jurisdiction.

Whether or not we mitigate the sovereign reluctance, we hold that under its plenary power a Colorado district court can make the relative rights of the United States a subject of its decree and can bring under its jurisdiction additional necessary parties in order to make such a decree fully valid, effective and enforceable. Before elaborating on this declaration, we deem it advisable to discuss some of the features and problems involved—or perhaps to be involved—in any decretory approach to the water rights of the United States in Colorado, which must be confronted someday whether in our state courts or in a federal forum.

In the district court the United States filed a memorandum supporting its motion to dismiss. It there made the following statement concerning its claims to the use of water:

“The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

“The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the purpose of said withdrawal with a priority of August 25, 1905.

"In addition to our general reserved right, the United States will claim various specific uses, as follows:

"(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

"(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

"(c) 10 C.F.S. for the Minturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S $87^{\circ} 25'W$, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

"(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S $75^{\circ} 31'W$, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

"(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time."

In its application here, the United States makes the statement, "The court had no jurisdiction to adjudicate rights other than those arising under Colorado law, but the United States claims rights otherwise arising." We are not sure whether by this statement the United States asserts that none of its rights have arisen under Colorado law. For the purpose of our discussion we will assume that it claims both (a) water rights reserved in connection with the withdrawal of public lands and which it asserts have not arisen under Colorado law and (b) appropriations arising under Colorado law (such as possibly may be the case as to water diverted by the Nelson Ditch mentioned in its memorandum).

V

RESERVED RIGHTS

The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially antedating several of the supplementary decrees in Water District 37 under the authority of *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542; *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L. Ed. 1215; *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136.

In contrast, counsel for the intervenor Central Colorado Water Conservancy District contend that the United States has no rights whatsoever except any that it might have acquired in the same manner as

an individual. In support of this they cite Article XVI, §§ 5 and 6 of the Colorado constitution and *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220. These sections were placed in the constitution at the time it was prepared under the enabling act of Congress. Section 5 and a portion of Section 6 read as follows:

“Section 5. Water of streams public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

“Section 6. Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *

In *Stockman* this court stated:

“This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of

these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity. We therefore find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

The authorities cited by the United States are not directly in point so far as its rights in Colorado are concerned. *Arizona v. California, supra*, involves claims of the United States on behalf of Indian reservations and other withdrawn lands, most if not all of which were created or withdrawn prior to the time Arizona was admitted into the Union in 1912. Furthermore, Arizona has never had a provision in its constitution declaring proprietorship of water as does the Colorado constitution. In *Arizona v. California* it was said:

"Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and bene-

fit of federally reserved lands rests largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845), and *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331 (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

Certainly this is not authority to refute the contention that, by reason of the provisions of Colorado's constitution as originally adopted, the United States surrendered its right in the future to reserve water.

In *Federal Power Commission v. Oregon*, *supra*, the Commission had issued to a power company a license to construct a hydro-electric plant, including a dam across a navigable stream. The dam was to be located in part upon an Indian reservation and the remainder upon lands long before withdrawn for power purposes. The project did not involve any permanent diversion of water as the entire flow of the river would run through or over the dam into the natural bed of the stream. It was held that the Federal Power Act was applicable to the license and a license from the state was not necessary. Again, this case is not direct authority for the answer sought here in Colorado.

Winters v. United States, *supra*, involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union "upon an equal footing with the original States" (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union.

The *United States v. Rio Grande Dam & Irrig. Co.*, *supra*, involved acts within the Territory of New Mexico prior to the time New Mexico became a state. It was there stated:

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Here, instead, we are dealing with a non-navigable stream and instead of having an "absence of specific authority from Congress," the question is what was the specific authority from the United States in its recognition of the Colorado constitution.

"In sharp contrast, however, stand federal rights under the reservation doctrines, which are the subject of mystery, whose true nature can be unveiled only through the search of the few obscure instances wherein they have been

adjudicated." The foregoing is from the study submitted to Public Land Law Review Commission, *supra*, P. S-13.

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. We do say at this time that, except for *Stockman v. Leddy, supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound.

VI

WATER APPROPRIATIONS OF THE UNITED STATES UNDER STATE LAW

As already mentioned, the United States has not been a party in any previous general adjudication in District 37. In its brief the Government cites Colorado statutes and our decisions under which decrees in water adjudications cannot be attacked after four years and in a subsequent water adjudication a priority cannot be given to a use of water prior to the date of the last adjudicated decree. It quotes from *Arizona v. California*, 298 U.S. 558, 56 S. Ct. 848, 80 L. Ed. 1331, that "no decree rendered in its absence can bind or affect the United States * * *." The brief continues:

"It is self-evident that supplemental water adjudications are not actions to which the United States has consented. It would be absurd to hold that the United States is bound by prior adjudications to which it was not a party and is thus now bound by proceedings in which it cannot have its rights adjudicated. Such a holding would convert 43 U.S.C. Sec. 666 into an instrument of injustice that would destroy the rights of the United States. It is for this reason that 43 U.S.C. Sec. 666 consents only to an adjudication in which all the rights of all users are before the court."

The quoted language in *Arizona v. California* was not made in connection with an adjudication of water rights by a state court and here again we are going to wait until the matter is argued more fully and specifically before making a determination as to whether this applies to Colorado water adjudications. Offhand, we are inclined to believe that it does apply. In *Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P. 2d 476 there was involved water appropriated in Utah from Rock Creek, which arises in Utah, flows into Colorado, and then returns to Utah. The question was whether Utah users were bound by a Colorado adjudicative decree more than four years old. This court held that they were not and in this opinion Mr. Justice Stone wrote:

"However, the decree can speak only as to matters within the jurisdiction of the court, and where the court in such a statutory proceeding attempts to determine matters beyond its competence, its decree, as to such matters, is not conclusive. 'If the court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the court had juris-

diction of the parties and of the subject matter.' *People ex rel. v. Burke*, 72 Colo. 486, 212 Pac. 837. So where the court by its decree attempted to adjudicate the ownership of the water, it was held that, 'In so far as this decree purports to settle and fix relative rights of individual users and consumers of water through said ditch, it is ineffectual.' *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345. And, to the extent a decree is beyond the authority of the court, it cannot be made valid by any rule of *res judicata* or any statutes of limitation. It is no more effectual after four years, than before."

It well may be that the same principle should be applied to appropriations made by the United States which have not been included in previous adjudications to which the United States was not a party.

VII

JURISDICTION OVER THE WATER CLAIMS OF THE UNITED STATES

We now return to the proposition asserted earlier that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights and relative priorities. For the purpose of our holding in this respect we make the following three assumptions *arguendo*: (1) The United States has reserved water rights in Water District 37 initiated prior to more recent general adjudication decrees in that district; (2) The United States has acquired rights to the use of water under Colorado law and such rights were initiated prior to the decrees just mentioned; and (3) The United States is entitled to a decree that its rights to the use of water are the same as if each of those rights had been awarded priorities in a water adjudication next following the initiation of

the right. We repeat—these are assumptions *arguendo*—not determinations.

Water rights in Colorado are of the greatest importance to the welfare and economy of the people of this state, and of considerable importance to the United States. There are about 2,700,000 acres of land under irrigation in Colorado. Of the 66½ million acres of land in Colorado, the United States has 36.4%—or about 24½ million acres—in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.

We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure—and this is equally true from the standpoint of the United States as well as Colorado and its citizenry. The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction. "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein * * *." Colo. Const. art. VI, § 9(1). We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration.

The following remarks of Professor Karl N. Llewellyn are apt in this situation:

"But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system." Llewellyn "Remarks on the Theory of Appellate Decision" etc., 3 Vanderbilt L. Rev. 395.

Moreover, there are statutes which appear to recognize this jurisdiction which we hold is plenary:

"For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between owners and claimants of water rights drawing water from the same source within the same water district, and all other questions of law and questions of right growing out of, or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the county in which said water district exists * * *." C.R.S. 1963, 148-9-2.

"It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state." C.R.S. 1963, 148-21-2(1) being the

Water Right Determination and Administration Act of 1969.

For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights. Of particular significance was the letter of the Acting Assistant Secretary of the Interior to the Chairman of the Committee on the Judiciary as to the McCarran Amendment under date of August 3, 1951. This is made a part of the Committee's Report mentioned earlier on pages 7 and 8. Senate Calendar No. 711, *supra*. A portion of the letter reads:

"The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U.S. 564 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U.S.C. 661), July 9, 1870 (16 Stat. 218, 43 U.S.C. 661), and March 3, 1877 (19 Stat. 377, 43 U.S.C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with

varying degrees of accuracy, to be the 'owner' of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter."

See also the discussions in 19 Stan. L. Rev. 65, *et seq.*; 20 Stan. L. Rev. 1187, *et seq.* and the Study submitted to the Public Land Law Commission, pp. 189-195, mentioned above. We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication.

VIII

NOTICE

In its appearance before the district court the City and County of Denver moved for an order providing for the notification of all appropriators in Water District 37 in order that the priorities of the United States' claims to water might be adjudicated. It filed a brief supporting its belief that the court can do this under the portion of C.R.S. 1963, 148-9-7 which reads, "if the proceeding be supplemental as to one class of rights, for example, irrigation, and original as to another class, for example nonirrigation, the service shall be necessary on those whose rights have already been adjudicated." The claims of the United States, says Denver, is another class of rights under that statute.

The United States and most of the other parties here disagree. As we hold that the district court has jurisdiction by reason of its plenary powers, it follows that the court need not have a statutory provision for notice. After the United States has filed its statements of claim in the district court, including the priority dates it seeks, the court then can determine which claimants of adjudicated rights need be given notice and can specify the manner that notice shall be given. Obviously, notice should be directed to those who might be adversely affected if the prayers for relief of the United States were granted.

Undoubtedly it would be preferable to have a statute setting forth the manner of notice in the circumstances under consideration, and it well may be that legislation in other respects might be helpful in implementing the jurisdiction of our courts over the United States. But although desirable, legislation is not necessary to implement the adjudication of rights under this opinion nor to protect the rights of all parties who may be involved, including the United States.

IX

WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969

Senate Bill 81 adopted in 1969 (C.R.S. 1963, 148-21-1 *et seq.*) was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this

matter. We do make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

Rule discharged.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 23819
(Original proceeding)

THE UNITED STATES OF AMERICA, PETITIONER
vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO AND THE JUDGE
THEREOF, THE HONORABLE HAROLD A. GRANT,
RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, ACTING BY AND
THROUGH ITS BOARD OF WATER COMMISSIONERS,
CENTRAL COLORADO WATER CONSERVANCY DISTRICT,
AND THE NEW JERSEY ZINC COMPANY, INTER-
VENORS

On consideration of the pleadings and arguments herein, it is hereby ordered that the rule to show cause heretofore issued in this action be, and it hereby is, discharged.

By the Court. September 15, 1969.

Supreme Court, State of Colorado. Certified to be a full, true and correct copy October 1, 1969.

(Court Seal)

RICHARD D. TURELLI,
Clerk of the Supreme Court.

By FLORENCE WALSH,
Deputy Clerk.

FILE COPY

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Office Supreme Court, U.S.
FILED
MAR 14 1970

Supreme Court of the United States
OCTOBER TERM, 1969

THE UNITED STATES OF AMERICA,

Petitioner,

v.

**THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO and the Judge Thereof,
THE HONORABLE HAROLD A. GRANT,**

Respondents,

**THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY
AND COUNTY OF DENVER, Acting by and Through Its Board
of Water Commissioners, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, and THE NEW JERSEY ZINC COMPANY,**

Intervenor,

**BRIEF FOR RESPONDENT DISTRICT COURT AND FOR THE
COLORADO RIVER WATER CONSERVATION DISTRICT
IN SUPPORT OF CERTIORARI**

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 1178

THE UNITED STATES OF AMERICA,

Petitioner,

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO and the Judge Thereof,
THE HONORABLE HAROLD A. GRANT,

Respondents,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY
AND COUNTY OF DENVER, Acting by and Through Its Board
of Water Commissioners, CENTRAL COLORADO WATER CON-
SERVANCY DISTRICT, and THE NEW JERSEY ZINC COMPANY,

Intervenors,

**BRIEF FOR RESPONDENT DISTRICT COURT
AND FOR THE COLORADO RIVER WATER
CONSERVATION DISTRICT IN SUPPORT
OF CERTIORARI**

The respondent court and the Colorado River Water Conservation District support the request of the United States that the writ of certiorari be granted because of the importance of determining now the question of state court jurisdiction under 43 U.S.C. §666. However, we differ from the Government in its view that the court below erred, and believe that consideration of the question of whether to grant the writ can be facilitated through the presentation of the questions, the facts and the arguments as set forth herein.

QUESTIONS PRESENTED

1. Whether under 43 U.S.C. § 666 a state court in adjudicating water rights under state law can obtain jurisdiction over the United States.

2. Under joinder of the U.S. pursuant to 43 U.S.C. § 666, must the United States set forth with particularity all of its claims to water for adjudication by such state court with those of other claimants.

STATUTE INVOLVED

In addition to 43 U.S.C. § 666(a) which is set forth in full in the Government's Petition (at 2), we think § 666(b) and (c) material, as follows:

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

STATEMENT

The interest of the District. The Colorado River Water Conservation District (District) is a public agency of the State comprising the area of all or part of 15 counties in western Colorado. It was established in 1937 for the purpose of conserving and developing the waters of the Colorado River and its tributaries within the State.¹ The Eagle River and its tributaries, a river system within District territory, joins the Colorado River at a point not far upstream from Glenwood Springs, Colorado, where the District maintains its headquarters. It is the Eagle River system which is the subject of this suit.

¹ Colo. Rev. Stat. §150-7-1 (1963).

Background of this case. The action which brings us to this Court started in October, 1967, when, upon application by the District, the District Court for Eagle County, Colorado issued a Notice of Application for Supplemental Adjudication of Water Rights² in what was then Water District No. 37,³ covering the only river system therein, namely the Eagle River and its tributaries. The Attorney General of the United States was served with this Notice, pursuant to 43 U.S.C. § 666(b) (R.10).⁴

Upon being served, the United States moved that it be dismissed “. . . for lack of jurisdiction . . .” (R. 14), but nevertheless noted in a supporting memorandum that rights would be claimed to the use of water related to certain reservations of public lands (principally the White River National Forest), as well as rights to in excess of 220 specific uses. The Government’s general description of these claims is set forth in full in the opinion of the court below. (Pet. App. 33-34; see also R.26-27).

The respondent court denied the Government’s motion to dismiss on August 20, 1968 and set October 21, 1968 as the date for filing statements of claim and October 28, 1968 as the date for taking evidence (R. 5,6).

Thereupon, the United States applied to the Supreme Court of Colorado for a writ in the nature of prohibition

²As provided for in Colo. Rev. Stat. 148-9-7 (1963); Repealed, Session Laws, Colo. (1969) C. 373, §20.

³In 1969, the Colorado Legislature passed the Water Rights Determination and Administration Act of 1969, codified as Colo. Rev. Stat. 148-21-1 et seq. (1963), referred to in the Government’s Petition at 18, fn. 15. The 1969 Act replaced the 70 existing Water Districts with 7 Divisions. The Colorado River and its tributaries within Colorado, exclusive of the Gunnison, are now in Division 5.

⁴The requirements of Fed. R. Civ. P. 4(d) (4) were also observed.

directed to the respondent district court, asking that that court be prohibited from asserting jurisdiction over or adjudicating any water rights of the Government (R. 1). In seeking this writ the United States advised the court below (R. 7):

It should be pointed out, of course, that if this Court were to find that this Application [for prohibition] and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances.

The Supreme Court of Colorado issued a rule to show cause as to why the writ should not be issued (R. 92) and considered the cause upon briefs and oral argument. On September 15, 1969 the court below discharged the rule (R. 202), and rendered its opinion (Pet. App. A; R. 171). The opinion held that 43 U.S.C. §666 gave jurisdiction to the respondent district court (Pet. App. 45); that that court could consider all of the claims of the United States from whatever source derived (Pet. App. 46); that that court had the authority to bring before it all necessary parties whose rights might be affected as a consequence of the adjudication of the rights of the United States (Pet. App. 47); and that inasmuch as the United States had not made

specific claims in terms of quantities of water as to reserved rights it was premature to rule thereon as to priority dates or quantities (Pet. App. 40).

While these holdings appear to satisfy most if not all of the above-quoted considerations advanced in the Government's application for prohibition, the United States nevertheless did not file claims in the respondent court but instead brought its petition here for a writ of certiorari, in effect seeking the prohibition denied it by the court below.

ARGUMENT

The issue for the Court in this case is whether the respondent court properly assumed jurisdiction of the United States.

We concur in the Government's view that the only statute by which the United States has given its consent to be made a party in such adjudication proceedings is 43 U.S.C. §666 (Pet. 11). Because of its great importance to the orderly adjudication and administration of water rights, the reach of that consent should now be definitively construed by this Court.

It might be argued that decision in this controversy should be withheld until the United States has actually specified all of its claims, including those claimed as reserved rights, and the Colorado court has decided the amounts and the priority dates for each in the context of all of the other claims put forth. But the jurisdictional question would apparently remain at the threshold of any later effort in this Court. It should be decided now, before further precious time has been lost and considerable further expense has been entailed.

We argue below our view that almost two decades ago Congress recognized the necessity of subjecting *all* of the claims of the United States to adjudication in proceedings such as the District instituted here. Only the States have systems for the adjudication *and* administration of water

rights. Section 666 covers both facets of this important field and applies fully to the situation before us.

1. Section 666 Was Intended to Grant Jurisdiction Over the United States in Water Rights Litigation Such as Presented by This Case.

This case involves "a river system" within the contemplation of 43 U.S.C. §666. It is misleading to recite that Water District 37 is one of 70 such districts in Colorado and does not therefore embrace a "river system" (Pet. 17). Even before the 1969 Act there were only 11 such districts comprising the Colorado River and its tributaries. Colorado adjudication statutes have always considered the Colorado River as a whole in establishing priority for the right to use waters therefrom.⁵

In its application for a writ of prohibition the United States noted that it could not be joined under 43 U.S.C. §666 for the reason that an "entire river system" would not be involved (R. 3; p. 4, *supra*). It might be sufficient to observe that the statute does not use the word "entire"—the language is "the use of water of a river system or other source". Whatever this phrase means, it certainly does not require an entire river system.

Nor does *Dugan v. Rank*, 372 U.S. 609 (1963), suggest otherwise. There the Court was concerned that it be a *general* adjudication of the rights on a given stream (*id.* at 618). As long as all those whose rights stand to be affected are given notice—as the court below indicated the

⁵Colo. Rev. Stat. 148-9-17 (1963) allowed anyone in the division, i.e. anyone using water from the Colorado River outside the district where adjudication was taking place, to participate therein, or by separate suit within four years after decree to challenge the in-district priority as it related to the river as a whole. *Holbrook Irrig. Dist. v. Arkansas Valley Sugar Beet & Irrig. Land Co., et al*, 54 F. 2d 840 (1931); *Fort Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrig. Land Co.*, 39 Colo. 332, 90 P. 1023 (1907). See also Pet. App. 31.

trial court would have the authority to require in this case (Pet. App. 47)—there would be a general adjudication (Pet. App. 29). And the Eagle River and its tributaries is not only “a river system” as the statute requires (and indeed the only river system and surface water source in what was Water District No. 37) but is furthermore a *given* stream or watercourse. This was precisely the term used by the Senate Committee on the Judiciary in reporting to the Senate on what was then S. 18 and what later became 43 U.S.C. §666, as follows:

... it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State . . .⁶

Indeed, in its memorandum supporting its application for prohibition the Government recognized that a “river system” is something less than the entire Colorado River in Colorado when it informed the court below:

... while it may not be necessary to conclude that all users of the Colorado System in Colorado must be joined, we believe all users outside a Water District that would be substantially affected by diversions in a Water District are necessary parties to a proper general adjudication under 43 U.S.C. Sec. 666 . . . (R. 62).

Finally reduced, the Government’s complaint here seems to be that the Congress in enacting §666 could not have intended that the United States be burdened with innumerable suits “as to only small portions of recognizable river systems” and “piecemeal adjudications” (Pet. 17-18). But quite apart from the fact that the Eagle and its tributaries comprise a clearly recognizable river system, in reporting unfavorably on what is now §666 some 19 years ago, the Justice Department complained in almost identical vein that waiver of immunity:

⁶S. Rep. No. 755, 82d. Cong., 1st Sess. at 6 (1951).

. . . would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions . . .⁷

The Committee, however, found little difficulty in brushing aside this objection as follows:

The Committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.⁸

2. If Proceedings for the Determination of Water Rights are to be Meaningful, the United States Must set Forth all of its Claims With Particularity.

The Senate Judiciary Committee, in reporting on what became §666 and after noting that it was essential that water users along a given stream, including the United States, had to be amenable to state administration of the stream, said:

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be *required to abide* by the decisions of the Court in the same manner as if it were a private individual.⁹

The Senate Committee clearly apprehended that if any water user claiming a right by reason of Federal ownership could claim immunity from State proceedings, these claims could materially interfere with proper administration of a stream as well as beneficial uses of others. In the Commit-

⁷Id. at 7.

⁸Id. at 2.

⁹Id. at 6, emphasis added.

tee's view it was necessary that state statutory water laws be applied to *all* claimants to the end that:

. . . the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users . . .¹⁰

The Committee quoted¹¹ from the opinion of this Court in *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447-48 (1916) in summarizing the essential purposes of these state water laws:

All claimants are required to appear and prove their claims . . . [The proceeding] is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible . . .; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

These high purposes can only be attained if the United States appears pursuant to 43 U.S.C. §666 in the Colorado proceedings and quantifies her claims of all descriptions. Otherwise any such proceedings will be rendered ineffectual.

¹⁰Id. at 5.

¹¹Id. at 5.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1969

No. ~~1138~~

87

UNITED STATES, Petitioner

v.

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF COLORADO

~~MOTION OF THE NEW JERSEY ZINC COMPANY TO BE HEARD
AS A RESPONDENT AND BRIEF IN OPPOSITION TO PETITION OF
THE UNITED STATES FOR WRIT OF CERTIORARI.~~

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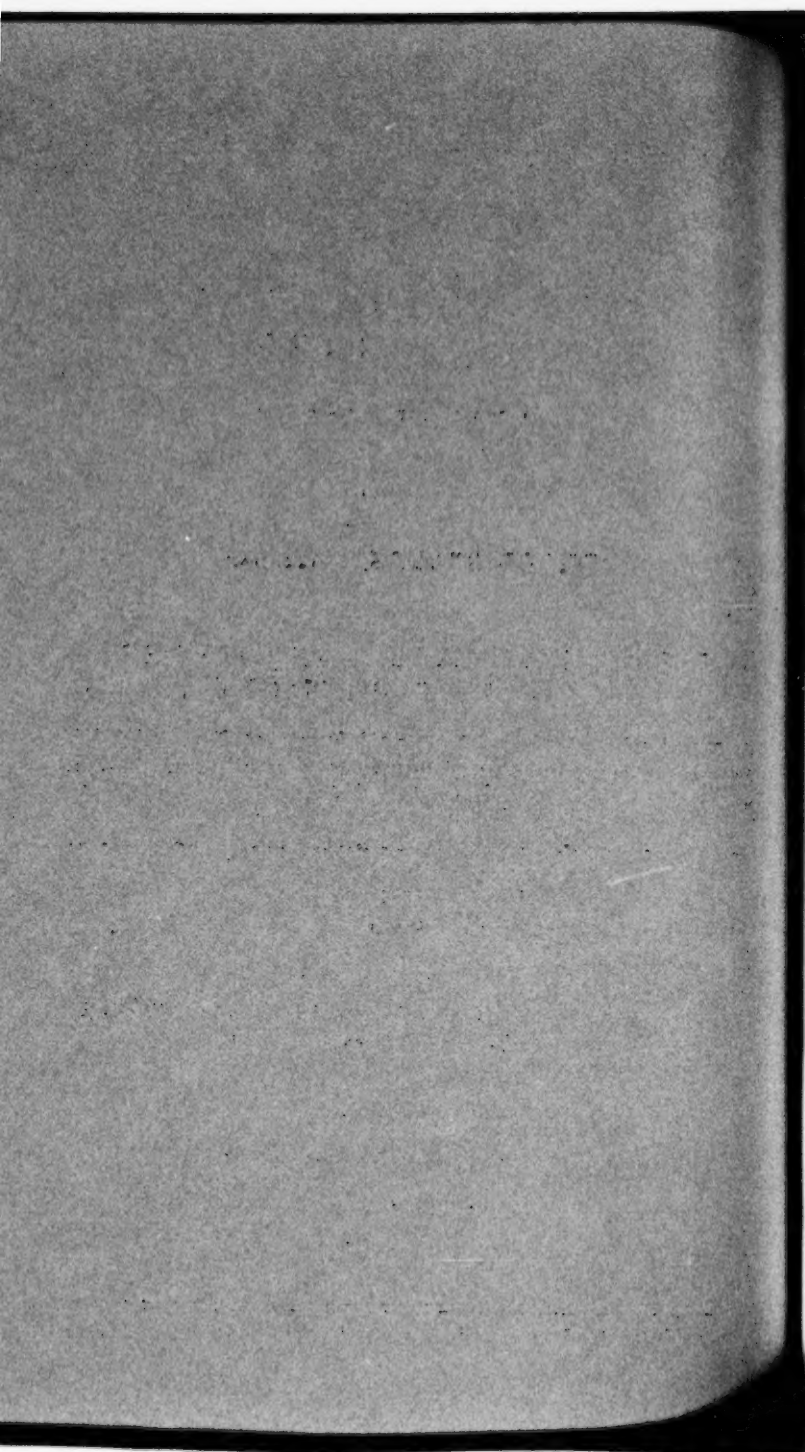
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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1178

UNITED STATES, Petitioner

v.

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF COLORADO

~~~~~  
**MOTION OF THE NEW JERSEY ZINC COMPANY TO BE NAMED  
AS A RESPONDENT AND FOR CORRECTION OF THE CAPTION**  
~~~~~

The New Jersey Zinc Company, a Delaware corporation, moves the Court to be named as a respondent in this case and for appropriate correction of the caption for the following reasons:

1. Notice of docketing of the petition for writ of certiorari on February 12, 1970, was received by counsel for The New Jersey Zinc Company on February 16, 1970, by mail addressed to counsel, but the petition for certiorari omitted The New Jersey Zinc Company as a respondent in the case.

2. Movant, as one of the parties in the pending proceeding in the District Court in and for the County of Eagle, Colorado, and as an intervenor in the case below before the Colorado Supreme Court is a party in a position adverse to that of the Petitioner and desires to oppose the petition for certiorari and to participate otherwise in this proceeding in all respects as a party respondent.

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1969

No. 1178

UNITED STATES, Petitioner

v.

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES
FOR WRIT OF CERTIORARI.

**Statement of Position of
The New Jersey Zinc Company**

The New Jersey Zinc Company, an Intervenor below, operates a mine and mill at Gilman, in Eagle County, Colorado. It depends upon the availability of an adequate, reliable water supply for use in its operations. To this end, it has acquired, under the statutes of the State of Colorado, numerous water rights in the Eagle River and its tributaries in Water District No. 37 of the State of Colorado, and has pending in the current adjudication proceeding in Water District No. 37 additional claims to the use of water. But all of the rights of The New Jersey Zinc Company would be jeopardized should a priority date be established for rights claimed by the United States for the White River National Forest as of the date the forest

lands were withdrawn from the public domain, August 25, 1905.

ARGUMENT

I. *The Finality Question*

The Petitioner agrees that the judgment of the Colorado Supreme Court¹ discharging the rule granting prohibition against the District Court of Eagle County from further proceeding in this matter is such a final judgment under 28 U.S.C. § 1256 (3) (1964) as to invoke the jurisdiction of this Court.² But even if the ruling of the Colorado Supreme Court is final, certiorari should not be granted. Since a ruling by this Court would be advisory only, the petition should be denied.

II. *The Court's Ruling Would Be Advisory Only*

As was said in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953):

Were our reviewing power not limited to "final" judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation.

Such is the case here.

The United States has been made a party to the Eagle County proceedings under the provisions of 43 U.S.C. § 666 (1964). Other than its motion attacking the trial court's jurisdiction, no pleadings have been filed by the

¹——— Colo. ———, 458 P.2d 760 (1969).

²Respondent believes that *Michigan C. R. Co. v. Mix* 278 U.S. 492 (1929), and *Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916), are more directly in point than the cases cited by the United States.

Government. No claim for rights to the use of water in Colorado, either for rights acquired under state law by the United States, or so-called "reserved" rights, has been filed by the United States.³ Until the United States has asserted a claim which has been denied either as to quantity or as to priority date, it has no ground for appeal to this Court.

The bulk of the petition filed by the United States speculates as to possible future arbitrary or illegal acts by the state courts of Colorado. Such a course of conduct on the part of a branch of a sovereign state should not be presumed.⁴ In the unlikely event that the United States, upon the conclusion of the Colorado proceedings, feels that it has not received all of the relief to which it is entitled, the normal avenues of review, including those providing for review by this Court, will remain open to it. This Court will not assume a fair trial cannot be afforded the United States in a state court.⁵

The United States seems in its Petition, at page 3, to concede that if the Colorado proceeding adjudicates rights to a river system, the Government must appear and assert appropriative rights acquired pursuant to state law, but that in no event should it be required to assert its reserved rights. This has not previously been the position of the United States.

³Colo. Rev. Stat. Ann. § 148-9-8(1) (1963) provides:

No owner nor claimant of any water right may introduce evidence concerning the same in any adjudication suit until there shall have been first filed in said suit a statement of claim duly signed and verified by or on behalf of one or more owners or claimants of such water right. . . .

⁴See e.g., *Owens v. Green*, 400 Ill. 380, 81 N.E.2d 149 (1948); *Ferdier v. Northern Pac. R. Co.* 75 N.D. 139, 26 N.W.2d 236 (1947); *Johnston v. Johnston*, 122 Fla. 372, 165 So. 698 (1936).

⁵E.g., *Darr v. Burford*, 339 U.S. 200, 205 (1950), **overruled on other grounds**, *Fay v. Noia*, 372 U.S. 391 (1963); *United States v. Dewar*, 18 F. Supp. 981 (D. Nev. 1937).

The position of the United States in *Green River Adjudication v. United States*, 17 Utah 2d 50, 404 P. 2d 251 (1965), cited on page 12 of the Petition, was that "the orderly way to administer such usage (reserved rights) would be through the appropriative laws of the State of Utah." No reason is suggested why a procedure orderly in Utah becomes disorderly in Colorado.

Fear is also expressed that the true date of appropriation may not be available to the United States because the present proceeding is a supplemental, rather than an original adjudication. Again, the concern is premature. The Colorado Supreme Court expressed confidence that the lower court, through appropriate notice procedures, could obtain jurisdiction of all necessary parties. Until this confidence is proved to be unfounded, this Court should not interfere.

Prior to 1969, Colorado was the only one of the states following the appropriation doctrine which authorized adjudications of portions of stream systems. By legislation adopted in 1969,⁶ water districts have been abolished, and each stream system is now a separate unit. If the argument of the United States is sound, the United States could be joined under 43 U.S.C. § 666 in 1970, but could not have been so joined in 1968. The fallacy of this argument seems clear. As pointed out in the Colorado Supreme Court opinion,⁷ the McCarran Amendment refers to "adjudication of rights to the use of water of a river system," rather than to an "entire river system." But Colorado law recognizes the interrelation of rights in separate water

⁶Colo. Sess. L. (1969) ch. 373.

⁷See the quotation from *Ft. Lyon Canal v. Arkansas Valley S.B. & I.L. Co.*, 39 Colo. 332, 90 P. 1023 (1907), quoted in the Colorado Supreme Court opinion, and found on page 31 of the Appendix to the Petition of the United States.

districts, and makes provision for the protection of all rights.⁸

CONCLUSION

The anticipatory cries of anguish arise before any trauma has occurred. We have here a proceeding under state law where the initiator of that proceeding has followed the procedures required to remove the immunity from suit normally exercised by the United States. As was stated in *Pan American Corp. v. Superior Court*, 366 U.S. 656 (1961), cited by the United States in its Petition at page 8:

But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since “the party who brings a suit is master to decide what law he will rely upon,” *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, the complaints in the Delaware Superior Court determine the nature of the suits before it.

. . . If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.

. . . What was said in *Gully v. First National Bank*, 299 U.S. at 116, is apposite:

“We recur to the test announced in *Puerto Rico v. Russell & Co.*, supra, ‘The federal nature of the right to be established is decisive—not the source of the authority to establish it.’ Here the right to be established is one created by the state. If that

⁸Petition of United States, Appendix A, 31-32.

is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co. v. Mottley, supra*. With no greater reason can it be said to arise thereunder because permitted thereby."

Although we believe that the propriety of the current state court proceeding and the jurisdiction of that court over the United States would be upheld if certiorari were granted, and the legal issues fully developed, we are equally certain that such a determination at this time would be premature and might very well fail to meet the ultimate issues presented after the United States has filed whatever statements of claim it may elect to file and there has been a decision on the merits. The expense and delay which the granting of certiorari would entail may well, in the final analysis, be wholly unnecessary and therefore should be avoided.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1178

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO

*ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Colorado Supreme Court (A. 19) is reported at 458 P.2d 760.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 15, 1969 (A. 45). On December 8, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including February 12, 1970. The petition was filed

on February 12, 1970, and was granted on March 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States in State courts for adjudication of its reserved water rights not predicated on State law.

2. Whether the congressional consent to suits against the United States "for adjudication of rights to the use of water of a river system" extends to a supplemental adjudication proceeding in one of some 70 water districts in Colorado which encompasses only a tributary of the Colorado River.

STATUTE INVOLVED

43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) provides in pertinent part:

Suits for adjudication of water rights.

(a) Joinder of United States as defendant; costs.

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have

waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

This case arises from the attempted joinder of the United States, pursuant to the Act of July 10, 1952, 66 Stat. 560 (43 U.S.C. 666), as a defendant in a supplemental water adjudication proceeding for Water District 37 in the Eagle County District Court in Colorado. Water District 37 is one of 70 water districts in Colorado, and encompasses "* * * all lands lying in the state of Colorado, irrigated by water taken from the Eagle river and its tributaries." Colo. Rev. Stat. 148-13-38 (1963). The Eagle River is a tributary of the Colorado River.

The United States moved to be dismissed as a party for lack of jurisdiction on the ground that its joinder in this proceeding is not within the consent to suit granted by 43 U.S.C. 666. Specifically, our objection is that the provisions of 43 U.S.C. 666 do not constitute consent to have adjudicated in a State court proceeding the reserved water rights of the United States, and that this particular proceeding, due to the inherent limitations of Colorado law, is not a general adjudication involving an entire river system. While denying State court jurisdiction over such

rights, the United States asserted reserved rights to sufficient water to accomplish the purpose of the withdrawal in 1905 of lands from the public domain for the White River National Forest (Presidential Proclamation of August 25, 1905, 34 Stat. 3144).¹

The objections of the United States to the jurisdiction of the Colorado courts were overruled by the State district court and, on the government's application for a writ of prohibition, by the Colorado Supreme Court. The Colorado Supreme Court in an *en banc* opinion held that the United States has consented, through the enactment of 43 U.S.C. 666, to the adjudication by State courts of its reserved water rights, that the Colorado district courts have jurisdiction under Colorado law to make such adjudications, and that this supplemental adjudication proceeding is an "adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. 666 (A. 29, 40-42).

In the course of its opinion the court strongly suggested that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights—*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435—were not determinative. It indi-

¹ In addition to this general assertion of reserved water rights for the White River National Forest, the United States listed specifically the current and foreseeable uses of such water, and the estimated amounts involved (A. 6-9).

cated that a decision that the United States has reserved rights in Colorado streams would require the overruling of *Stockman v. Leddy*, 55 Colo. 24. There it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,² lost any right to assert thereafter water rights in Colorado except those acquired by appropriation pursuant to Colorado law (A. 34-35).

SUMMARY OF ARGUMENT

I

43 U.S.C. 666 does not consent to adjudication of the reserved water rights of the United States by State courts. Its legislative history indicates that Congress intended to give the consent of the United States to be joined only in proceedings for the adjudication of water rights acquired pursuant to State law. Reserved rights are based solely on federal law, and are not dependent upon recognition by State law for their existence. Therefore, reserved water rights are not water rights acquired pursuant to State law.

² Article XVI, Section 5, of the Colorado Constitution, provides:

Section 5. Water of streams public property—The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Since State law, based on the appropriation system of water law, is inconsistent with the reserved rights doctrine, there is every indication that the reserved water rights of the United States would not be recognized in State adjudication proceedings. See *Green River Adjudication v. United States*, 17 Utah 2d 50. Taking into account considerations such as the conservation of natural resources, and other important reasons for federal withdrawals, Congress could not have intended to require the United States to submit its reserved rights in State adjudication proceedings and possibly defeat the purposes for which millions of acres of land have been withdrawn from the public domain. 43 U.S.C. 666 is a statute merely consenting to suit in certain circumstances, and is not one intended to dispose of valuable property rights of the United States. Any such disposition requires a clear expression of congressional intent, and that is plainly lacking in either the language or legislative history of 43 U.S.C. 666.

II

That the United States has reserved water rights based on withdrawals from the public domain is well established. *Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564. The withdrawal, in 1905, of lands in Colorado for the White River National Forest reserved enough water from sources on those lands to fulfill the purposes for which they were withdrawn. The Colorado Supreme Court's suggestion that the Colorado Constitution, which has been held to assert ownership of all unappropriated waters within the State, precludes ownership by the United States of reserved rights in Colo-

rado based on withdrawals from the public domain subsequent to statehood, is erroneous. Congress did not intend, in passing the enabling act providing for Colorado statehood, to give up any of its rights with respect to the public domain.

III

The supplemental adjudication proceeding in Water District 37 is not within the ambit of the consent to suit given in 43 U.S.C. 666. The legislative history of 43 U.S.C. 666, and the cases construing it, indicate that the United States consented only to *general* adjudication proceedings, where all parties claiming water rights on a stream system or other source are before the court, and all rights are to be determined *inter sese*. *Dugan v. Rank*, 372 U.S. 609; *Miller v. Jennings*, 243 F.2d 157 (C.A. 5), certiorari denied, 355 U.S. 827.

The proceeding in Water District 37 is not a general adjudication for two reasons. First, it does not embrace an entire river system. It includes only one tributary of the Colorado River, and involves only one of 70 water districts in Colorado. To require the United States to participate in such fragmentary adjudications would impose an intolerable burden of litigation on the government in order to protect its proprietary interests. Second, all parties claiming water rights in Water District 37 are not before the State court. Since under Colorado law the only parties to a supplemental adjudication are those who have acquired water rights subsequent to the last adjudication, and the United States claims water rights

with earlier priorities than those decreed in previous adjudications to which it was not a party, all parties necessary to a general adjudication are not before the court.

ARGUMENT

Introduction. An understanding of the issues in this case requires a careful consideration of federal withdrawals of land from the public domain, with particular emphasis on the purposes of such withdrawals. An apparent conflict is readily discernible between the federal rights arising from these withdrawals—*reserved rights*, and rights acquired pursuant to the appropriation system of water law prevalent in the western States—*appropriative rights*.

The United States owns approximately 725,000,000 acres of land in the 17 contiguous western States and Alaska. U.S. Department of the Interior, *Public Land Statistics*, p. 10 (1968). Of this, about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, military reservations, national parks, national forests, national recreation areas, national monuments, wildlife refuges, etc.³ Most of these withdrawals from the public domain have been made for the express purpose of conserving important segments of that area for the future use and enjoyment of the entire public of the United States, rather than for the particular profit or use of the people who happen to live and work in the

³ Wheatley, *Study of Withdrawals and Reservations of Public Domain Lands Prepared for the Public Land Law Review Commission*, App. G, Table G.1 (1968).

immediate area. Certainly this is true of the national forests, such as the one involved in this case. For the water which is essential to the utilization and administration of these lands, the United States depends both on water rights based on federal law and on water rights acquired pursuant to State law.

The water rights of the United States based on federal law consist primarily of reserved rights. Reserved rights entitle the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, with a priority as of the date of withdrawal, subject only to water rights vested as of that date. *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601. Not only is this a settled principle of law, but indeed a necessary one. For it would be idle to set aside large areas of the public domain for the enjoyment of future generations without providing the assurance of sufficient water for their maintenance.

On the other hand, the appropriation system of water law, which is prevalent in the western States,⁴ does not lend itself to such conservation for the future. One of the fundamental characteristics of the appropriation system is that the rights of users of

⁴ Alaska and eight of the western States, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, follow the strict appropriation system, or "Colorado doctrine." The other nine States have systems which contain elements of both the appropriation and riparian systems. 5 Powell, *The Law of Real Property*, Sec. 734, pp. 445-446 (1968).

water from the same source are carefully described as to priorities, amounts, and uses in adjudication proceedings. This requires the permanent fixing of rights to the use of water at the time of the adjudication proceedings. Furthermore, the total right is fixed as of the date of appropriation, *i.e.*, diversion and application to beneficial use. Such a system makes no provision for the future needs of lands withdrawn from the public domain.

I. 43 U.S.C. 666 Does Not Consent to Adjudications of the Reserved Water Rights of the United States

The Colorado Supreme Court has held that the United States, through the enactment by Congress in 1952 of 43 U.S.C. 666, has consented to the adjudication of its reserved water rights in State courts (A. 41). That holding is, we submit, erroneous. As indicated previously (*supra*, p. 6), the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601; *Winters v. United States*, 207 U.S. 564; *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-337, 339-340 (C.A. 9). In *Winters*, where the United States asserted this right with respect to an Indian reservation, this Court said (207 U.S. at 577):

[T]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. * * *

This essential idea has been brought up to date and correlated with the realities of modern public land management in *Arizona v. California*, 373 U.S. 546, 598, 601, where this Court stated:

We have no doubt about the power of the United States under these clauses [the Commerce Clause, Art. I, Sec. 8, and the Property Clause, Art. IV, Sec. 3, of the Constitution] to reserve water rights for its reservations and its property.

* * * *

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

Taking into account the unquestioned existence of federal reserved water rights, both the language of 43 U.S.C. 666 and its legislative history clearly show that Congress consented only to suits for the adjudication of water rights of the United States acquired pursuant to State law. The statute provides:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. * * *

The most reasonable construction of this language is that the phrase, "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise," limits the scope of the statute to rights derived from State law. The only words in that phrase which could include other types of rights, such as reserved rights, are "or otherwise." Application of the traditional rule of *ejusdem generis* leads to the conclusion that those words do not include rights not derived from State law. See Comment, *Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 Calif. L. Rev. 94, 109-112 (1960), where the matter is thoroughly discussed.

The legislative history of the statute supports the foregoing construction. Senate Report No. 755, 82d Cong., 1st Sess. (1951), on S. 18,⁵ stated the purpose of the legislation (pp. 4-5):

⁵ S. 18 never became law. It was added to H.R. 7289 in the 82d Cong., 2d Sess. (1952), which was enacted on July 10, 1952, as P. L. No. 495, 66 Stat. 560—now 43 U.S.C. 666.

In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights *acquired under State law* are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity. [Emphasis added.]

Continuing, the report further stated (pp. 5-6):

The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior

appropriation. When *these lands and water rights* were acquired from the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.

* * * *

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the Court in the same manner as if it were a private individual. [Emphasis added.]

On October 11, 1951, Senator McCarran, the sponsor of S. 18 and Chairman of the Senate Judiciary Committee which reported on the bill, said on the Senate floor (97 Cong. Rec. 12947, 12948 (1951)):

[T]he purpose of the proposed legislation is to permit the United States of America to be joined as a defendant in any suit for the adjudication of rights to the use of water * * * *where it appears that the United States is the owner, or is in the process of acquiring ownership of rights by appropriation under state law, and where there is a showing that the United States is a necessary party to such adjudication.* [Emphasis added.]

* * * *

Particularly in view of the fact that the United States has acquired its water rights from former owners who were subject to such suits, the committee is of the opinion that to allow the United States in its own right or as a trustee to have a better right than the former owner is not fair and just to the other water users on the stream.

* * * *

[T]he Government of the United States, during the past 15 or 18 years, has acquired on the various natural streams of the West holdings in real estate which was formerly taken up by private citizens, diverted water from the natural streams and applied it to the land. Then the Government acquired the land and the water rights. If some water user on the stream seeks to establish what his water rights are, he must of necessity bring the Government in as a party defendant or a party litigant in the suit.

Thus, an examination of the pertinent legislative history plainly shows that the thought foremost in the minds of the interested legislators was the problem created because the State courts were unable adequately to adjudicate the water rights of private individuals who made claims under the State appropriation system. This was because in many instances the United States also claimed appropriative rights under State law and hence was a necessary party to the general adjudication of such rights. Taking into account the nature of reserved rights, on the other hand, it seems obvious that consent to have them adjudicated would not alleviate the problems with which Congress was concerned. For that reason, the consent given in 43 U.S.C. 666 should not be construed to extend to the adjudication in State courts of the reserved water rights of the United States.

Certainly this interpretation, that the consent given by 43 U.S.C. 666 extends only to suits for the adjudication of the water rights of the United States acquired pursuant to State law, is consistent with the provision of the statute that

* * * the United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty * * *.

But if, as the Colorado Supreme Court has concluded, the consent extends to suits for the adjudication of the reserved rights of the United States, it might be argued that by this language the United States agreed that it has reserved rights only to the extent that they are recognized by State law. While we believe such an argument is untenable, the fact is that State law, which in the western States involves the appropriation system of water law, makes no provision for reserved water rights. Therefore, if the State courts have jurisdiction to "adjudicate" the reserved rights of the United States, this portion of the statute could be an effective instrument for the abolition of such rights, contrary to established principles of law, and could thwart the national policy of preserving natural resources. That this is a real and not a theoretical problem can be seen by a closer scrutiny of the western States' water law.

The appropriation system of water law in effect in most of the western States is essentially different from the concept of reserved water rights. Under the strict appropriation system, or "Colorado doctrine," a water right is acquired only through diversion and application of water to a beneficial use.⁶ *Coffin v.*

⁶ An actual physical diversion may be required only where necessary to apply the water to a beneficial use. See *Genoa v. Westfall*, 141 Colo. 533.

Left Hand Ditch Co., 6 Colo. 443. To "adjudicate" means, essentially, to fix the amount and priority date of a water right by determining when, and in what quantity, water was diverted and applied to a beneficial use. Colo. Rev. Stat. 148-9-11, 13 (1963). Such water rights are subject to loss through abandonment, a rebuttable presumption of which is raised by long non-use. *Mason v. Hills Land & Cattle Co.*, 119 Colo. 404. These legal characteristics are incompatible with reserved rights, which arise *automatically* when lands are withdrawn from the public domain, have priority dates as of the dates of such withdrawals, and apply to future as well as existing uses. *E.g.*, *Arizona v. California*, 373 U.S. 546, 595-601.

Central to the "Colorado doctrine" of water law is the idea that since, of "imperative necessity," the appropriation system has existed in Colorado "from the date of the earliest appropriations of water within the boundaries of the state," and ownership of land has never carried any water rights with it (*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110), the United States, like any other landowner, has only those water rights which it has acquired pursuant to State law.

In short, if the consent of 43 U.S.C. 666 extends to adjudication of the reserved water rights of the United States, the way is open for the Colorado courts and the courts of the other western States to attempt to "adjudicate" those rights out of existence.⁷ Con-

⁷ That this is what the Colorado Supreme Court had in mind is demonstrated by the following excerpts from its opinion (A. 23-24, 27) :

gress could not have intended that, however, for it would effectively convert 43 U.S.C. 666 from a statute simply consenting to suit in limited circumstances to an enactment effectively disposing of valuable property rights of the United States. To do this surely requires a clear and unambiguous expression of congressional intent; such an expression is plainly lacking, however, in the language and background of 43 U.S.C. 666. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404; *United States v. Fitzgerald*, 15 Pet. 407, 421; *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116.

Were the Colorado Supreme Court's decision permitted to stand, the reserved rights of the United States would be vulnerable to the vagaries of inconsistent State laws, with the result that the purposes for which millions of acres of land have been withdrawn from the public domain might be frustrated. The United States cannot, at this late date, perfect enough water rights under State law to satisfy the needs of these lands. Moreover, a decision of this

7 [Continued]

The trend of Congressional legislation has been to require the United States to be in the position of any other claimant to water rights.

* * * *

Our situation with respect to water rights has been that priorities are decreed under state laws, but that any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.

Court excluding reserved water rights of the United States from State adjudication proceedings would not produce the "undesirable, impractical and chaotic situation" that the Colorado Supreme Court envisioned (A. 27; see note 7, *supra*). Nothing in such a decision would preclude the United States from continuing the practice it has followed in the past—listing and seeking recognition, in adjudication proceedings to which it is otherwise properly a party, of its existing and estimated future requirements for water claimed under the reserved rights doctrine in the area involved.⁸

In short, it is our position that the plain language of the statute, fortified by its legislative history, shows that Congress, in enacting 43 U.S.C. 666, did not intend that the important reserved water rights of the United States be determined by State courts under State laws which are inconsistent with a recognition of the water rights necessary to the preservation of these valuable national assets for posterity.

II. The Reserved Rights Doctrine Is Applicable to Lands Withdrawn From the Public Domain in the State of Colorado

While the Colorado Supreme Court has not specifically denied the existence of federal reserved water

⁸ See letter of June 14, 1961, from Orville L. Freeman, Secretary of Agriculture, to Senator Clinton P. Anderson, Chairman, Senate Committee on Interior and Insular Affairs (Hearings before the Senate Committee on Interior and Insular Affairs, 87th Cong., 1st Sess., on problems arising from relationships between the States and the Federal Government with respect to the development of Water Resources, V. 3, pp. 31-32).

rights in Colorado or elsewhere in the West, its statements casting doubt on their existence underline our concern that State courts and State law together would, in fact, eliminate such rights. For this reason, we urge this Court specifically to reaffirm the principle that the United States has reserved water rights in the western States, including Colorado and other States with similar constitutional provisions.

The Colorado Supreme Court's assertion (A. 23-24) that the Desert Land Act, 19 Stat. 377 (1877), as amended, 43 U.S.C. 321,⁹ was intended "to require the United States to be in the position of any other claimant to water rights," is mistaken. When the area now comprising Colorado was ceded to the United States by France, Spain, Mexico and Texas,¹⁰ the United States became the owner of all property rights within that area, except those which had passed into private ownership under the previous sovereign. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16; *Knight*

⁹ That statute provides, in pertinent part: "[T]he right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. * * *"

¹⁰ Treaties of 1803 (Louisiana Purchase), 1819 (Florida Purchase), 1848 (Treaty of Guadalupe Hidalgo), and agreement with Texas in 1850.

v. *United States Land Association*, 142 U.S. 161, 183-184. The United States did not, by the Desert Land Act, transfer its ownership of unappropriated, non-navigable waters within the public domain to the States. That statute and its predecessors¹¹ merely provided that rights to the use of non-navigable waters within the public domain would pass from federal to private ownership in accordance with the appropriation system of water law established in the arid and semi-arid western States, rather than the riparian system established under the common law. As stated in *Federal Power Commission v. Oregon*, 349 U.S. 435, 447-448:

The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. *Jennison v. Kirk*, 98 U.S. 453. The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142. See also, *Nebraska v. Wyoming*, 325 U.S. 589, 611-616. [Emphasis in original.]

The result was that patents of public lands in States where the Desert Land Act was applicable did not carry water rights with them. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162-164. In so holding, this Court stated (*id.* at 162):

¹¹ Act of July 26, 1866, 14 Stat. 253, and Act of July 9, 1870, 16 Stat. 218 (43 U.S.C. 661).

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * * The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. * * *

The Court had made it clear earlier, in *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, that the Desert Land Act and related statutes were intended only to recognize the appropriation system of water law in the western States, not to abdicate the rights and powers of the United States with respect to water on the public domain. There the Court had stated (*id.* at 703):

Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering

on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * *

Moreover, the Desert Land Act is inapplicable to lands which have been withdrawn from the public domain. *Federal Power Commission v. Oregon*, 349 U.S. 435, 448.

The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution which the Colorado Supreme Court, in *Stockman v. Leddy*, 55 Colo. 24, construed as an assertion of ownership of all unappropriated waters within its borders, does not preclude ownership by the United States of reserved water rights in Colorado. *Arizona v. California*, 373 U.S. 546, 597-598. By passing the enabling act providing for Colorado statehood,¹² Congress intended only to authorize statehood, not to give up any of its property rights with respect to the public domain. This is made clear by Section 4 of the enabling statute, which provides:

[T]he people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States * * *.

¹² Act of March 3, 1875, 18 Stat. 474.

Sections 7, 8 and 9 of the statute specifically granted the future State the right to select lands from the public domain for use for schools, public buildings, and a penitentiary. Had Congress intended to grant anything else, it would have done so by specific provision in the enabling legislation. The principle that public grants are to be construed against the grantee, and that nothing passes by implication, applies to grants by the United States to a State or a Territory. *Rice v. Railroad Co.*, 1 Black 358, 380-381; *United States v. Michigan*, 190 U.S. 379, 401. Moreover, the enabling act was passed before Colorado adopted its constitution. After the constitution was adopted, Colorado was admitted into the Union by Presidential Proclamation (19 Stat. 665) without further action by Congress. Notwithstanding any provisions of the Colorado constitution, then, it is clear that when, on August 25, 1905, lands in Colorado were withdrawn from the public domain to establish what is now the White River National Forest,¹³ enough of the appurtenant water was reserved to fulfill the purposes for which those lands were withdrawn, subject only to water rights vested on that date.

III. The Proceeding in Water District 37 is not the Type of Suit to which 43 U.S.C. 666 Consents

The conclusion to be drawn from the legislative history of 43 U.S.C. 666, as well as the cases construing it, is that the proceeding to which the United States is sought to be joined must be one where all

¹³ Presidential Proclamation of August 25, 1905, 34 Stat. 3144.

parties claiming rights to the use of the water of a river system or other source are before the court, and all claimed rights are to be determined *inter sese*.

Senate Report No. 755, 82d Cong., 1st Sess., p. 9 (1951), indicates the nature of the proceeding contemplated by quoting from *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447-448, where this Court described a State water adjudication proceeding:

All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end * * * that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy;
* * *

The Senate report also contains a letter from Senator McCarran, chairman of the committee reporting on the bill, to Senator Magnuson (p. 9):

S. 18 * * * is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

In *Dugan v. Rank*, 372 U.S. 609, this Court held that a suit involving water rights on a portion of the San Joaquin River in California was not the kind of

"general adjudication" contemplated by 43 U.S.C. 666. There the Court stated (*id.* at 618-619):

It is sufficient to say that the provision of the McCarran amendment, 66 Stat. 560, 43 U.S.C. § 666, relied upon by respondents and providing that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," is not applicable here. Rather than a case involving a *general* adjudication of "all of the rights of various owners on a given stream," S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to the appropriative and prescriptive rights asserted.
* * * [Emphasis in original.]

In like vein, in *Miller v. Jennings*, 243 F.2d 157, 159 (C.A. 5), certiorari denied, 355 U.S. 827, the court said:

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner:

"The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time." *People of the State of California v. United States*, 9 Cir., 1956, 235 F.2d 647, 663. See *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084."

The supplemental adjudication proceeding in Water District 37 does not meet the foregoing requirements of a general adjudication, and the court below accordingly erred in holding that the United States was properly joined. The United States does not contend that the cases construing 43 U.S.C. 666 are necessarily dispositive of the question whether Water District 37, which embraces the watershed of one tributary of the Colorado River, comprises a "river system" within the meaning of the statute. But it seems apparent from the legislative history that Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate only fragments of recognizable river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread.

¹¹ See also the opinion of the court of appeals, *sub nom. State v. Rank*, 293 F.2d 340, 346-348 (C.A. 9), which was affirmed in *Dugan v. Rank*, *supra*; *State of Nevada v. United States*, 279 F.2d 699, 701 (C.A. 9); *City of Chino v. Superior Court of Orange Co.*, 255 Cal.App.2d 747.

Where a river system can be said to be wholly contained within one State, the proceeding should at least relate to the entire system and include all parties asserting rights to the water thereof. And where a river system traverses the boundaries of a single State, the United States should not, we submit, be required to assert its rights in any proceeding that is less than statewide in character.

Turning to the instant case, we emphasize the fact that Water District 37 is only one of 70 water districts in Colorado, and that the United States has been joined in similar proceedings in Water Districts 36, 51 and 52 in Colorado,¹⁵ as well as in other States, including Utah, Idaho, New Mexico and Washington. More such suits can be expected to follow if the Colorado Supreme Court's decision is allowed to stand. Such a result, we believe, would significantly distort and effectively thwart the intent of Congress.

¹⁵ On June 7, 1969, the Water Right Determination and Administration Act became effective in Colorado. The Act amends Colo. Rev. Stat. 148-21-1 *et seq.* (1963) by consolidating the 70 water districts into seven water divisions, each designed to include an entire river drainage basin. Water District 37 will be within Division 5, which includes the Colorado River and its tributaries, except the Gunnison River. The Act governs adjudication proceedings initiated after its effective date, but appears to give parties to actions pending at that time the option of proceeding under the new statute. However, since the Colorado Supreme Court found the Act to be immaterial to its decision (A. 22), it is not discussed in detail here. In any event, the new legislation does not detract from the importance of the question presented here, because it does not affect the problem of piecemeal adjudications in other western States.

The legislative history of 43 U.S.C. 666 and the cases construing it make clear that one of the conditions of the congressional consent to suit is that, regardless of the size of the stream or other source involved in the adjudication proceeding, all parties who claim water rights must be before the court. *Dugan v. Rank*, 372 U.S. 609, 618; *Miller v. Jennings*, 243 F.2d 157, 159 (C.A. 5), certiorari denied, 355 U.S. 827. Under Colorado law, however, the only parties before the court in a supplemental adjudication proceeding are those who claim water rights acquired since the last adjudication in that water district. Colo. Rev. Stat. 148-9-7 (1963). The earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding adjudication. Colo. Rev. Stat. 148-9-13 (1963); *Haresty Reservoir, Canal & Land Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 85 Colo. 555. The last water adjudication decree in Water District 37 was entered on February 21, 1966. The United States was not a party to that or any prior proceeding in Water District 37.

Thus, since the United States claims water rights in Water District 37, acquired under State law, with earlier priority dates than those previously decreed, in order for there to be a general adjudication determining all claimed rights *inter sese*, within the contemplation of 43 U.S.C. 666, the owners of the previously decreed rights must also be before the court. In other words, the United States cannot be bound by previous decrees in Water District 37 entered in its absence. *Arizona v. California*, 298 U.S.

558, 571-572.¹⁶ The Colorado Supreme Court's statement (A. 43) that the district court can bring additional parties before it does not resolve the jurisdictional problems presented. The proceeding to which the United States is sought to be joined must meet the requirements of 43 U.S.C. 666 at the time of the attempted joinder, or else jurisdiction over it is lacking. It is therefore inescapable that this supplemental adjudication proceeding in Water District 37, even assuming that an entire river system is in fact involved, is not a general adjudication that comes within the ambit of the consent to suit given by 43 U.S.C. 666, and that the Colorado Supreme Court erred in concluding to the contrary.

¹⁶ Although the Colorado Supreme Court said it was "inclined" to agree, it refused so to hold (A. 38).

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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MAY 1970.



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IN THE
Supreme Court of the United States

October Term, 1969
No. 1178

UNITED STATES,

Petitioner,

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO,

Respondent.

**Brief of the State of California as Amicus Curiae
in Support of the District Court in and for the
County of Eagle and State of Colorado**

The State of California, by and through its Attorney General, files this Amicus Curiae brief in support of the District Court in and for the County of Eagle and State of Colorado.

Interest of Amicus

The questions raised in this matter are of great importance in the administration and adjudication of water rights throughout the western United States.

The United States in the State of California, as in most of the western states, owns large portions of the lands within the state. The claim of water rights by the federal government resulting from the ownership of such lands must be considered in the overall planning and development of the State of California. This is

particularly true in the relatively arid and faster growing portions of the southern portion of the state.

A general adjudication of water rights to establish all demands upon a limited supply is the basic legal means of aiding in this vital resource planning.

The scope of the waiver of sovereign immunity to allow general adjudication of water rights claimed by the United States set forth in the McCarran Amendment (43 U.S.C. 666), the essential question presented to the Court in this case, is, therefore, of prime concern to the State of California. Rational resource planning cannot occur unless the rights of all parties, including the United States, to the resource are known. The interpretation of the District Court and of the Supreme Court of the State of Colorado holding that the United States must adjudicate its claims to portions of a stream system and to "reserved rights" correctly construes the McCarran Amendment. Only by such a construction can the result intended, comprehensive planning and development based upon practical and reasonable hypotheses, proceed. There are few matters of larger import to the State of California.

Questions Presented

1. Does the McCarran Amendment waive sovereign immunity only when an entire river system is adjudicated at once?
2. Assuming an adjudication to be within the waiver of immunity contemplated by the McCarran Amendment, must that adjudication ignore and exclude a determination of the United States claims of reserved water rights?

Summary of Argument

Review of the opinion of the Supreme Court of the State of Colorado and of the documents filed by the parties indicates extensive briefing of the legislative history and interpretative background of the McCarran Amendment. Amicus can add little but repetitive support to these arguments of respondent and does not, therefore, burden the Court with that repetition.

Similarly, the question of the nature of a "supplemental proceeding" under the Colorado law as a general adjudication would appear best left to the parties. Amicus, based upon its knowledge of such proceedings, believes that they are intended to establish water rights and priorities between claimants to a water source and are thus "general" within the meaning of the Court in *Dugan v. Rank*, 372 U.S. 609 (1963). See as to the general nature of the Colorado water right adjudication, 1 Clark, *Waters and Water Rights*, § 23.1, pp. 124-25.

Finally, both parties appear to agree that immunity is waived as to a "general adjudication" and that a "general adjudication" is one in which the rights of claimants to a water source are adjudicated *inter sese*. Amicus concurs.

Assuming *arguendo* that the proceeding involved herein is a general adjudication, two questions remain:

1. Does the McCarran Amendment waive sovereign immunity only when an entire river system is adjudicated at once?

2. Assuming an adjudication to be within the waiver of immunity contemplated by the McCarran Amendment, must that adjudication ignore and exclude a determination of the United States' claims of reserved water rights?

Amicus contends that the McCarran Amendment waives immunity in an adjudication of water rights' claims *inter sese* within any determinable unit, whether that unit be the whole or a portion of a river system. Amicus further asserts that since an adjudication exclusive of "reserved rights" would render such litigation and the McCarran Amendment utterly valueless, reserved rights are clearly within the scope of rights intended to be determined under the McCarran immunity waiver.

ARGUMENT

I

The McCarran Amendment (43 U.S.C. 666) Waives the Sovereign Immunity of the United States in Any Case in Which There Is a "General Adjudication" of Rights Within a Determinable Unit

The McCarran Amendment was intended to require the participation of the United States in any action to generally adjudicate water rights. Senate Report No. 755, 82d Cong., 1st Sess., p. 9 (1951); 97 Cong. Rec. 12947-48 (1951); 98 Cong. Rec. 122 (1952). To achieve the intent of Congress, the Amendment must be held to apply to any action in which there is an adjudication of a unit in which both supply and demands can be fixed *inter sese* (hereinafter referred to as a "determinable unit"), whether or not that unit is an entire river system.

General adjudications of water rights have but one purpose. Recognizing that water is a limited commodity, the adjudication attempts to define the rights and priorities of claimants to the supply.

"All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the tes-

timony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators." *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 447.

The problem presented by an adjudication is largely an accounting one. Supply must be ascertained to adjust demands. Demands must be known to apportion supplies with appropriate priorities. Obviously, then, both supply and demand must be clearly known and delineated.

The question presented in this matter is simply the size of the area which must be litigated in a single action for the waiver of immunity to be effective.

The position of the United States is that the McCarran Amendment waives sovereign immunity in nothing less than a full river system adjudication. (United States Brief, pp. 27-28.) Taking this premise, to adjudicate a water right of the United States on lands adjacent to the Rush River, near Martell, Pierce County, Wisconsin, under the waiver of the McCarran Amendment, water rights of owners in Addis, Louisiana, would have to be included. The Rush River is part of the Mississippi River system. To adjudicate Water District 37, Colorado, involved in the instant case, one must also proceed to determine rights in Yuma, Arizona. Such an interpretation is patently unreasonable, if not absurd, and obviously renders the McCarran Amendment ineffectual. Such a construction must be avoided:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by

which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose, rather than the literal words.*" *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940). (Emphasis added.)

The result urged by the United States, based upon the largest conceivable construction of the words "river system" is not only at variance with the clear policy and purpose of the McCarran Amendment, but ignores a perfectly rational and feasible interpretation of the statute.

The logical interpretation of the McCarran Amendment is that a waiver of sovereign immunity applies to the adjudication of any unit of a river system as to which an acceptable accounting of supply and demand can be made. This concept of determinable unit adjudications is sound and accepted, both as a matter of law and engineering. Engineering experts have long divided drainage systems in hydrologic units for purposes of water supply analysis. Hirshleifer, Dehaven, and Milliman, *Water Supply, Economics, Technology, and Policy*, § 3, p. 17. Such units can be defined because of physical features as surface or underground barriers to

water passage which allow the unit to be isolated for purposes of supply and demand accounting. The courts have generally adjudicated water rights within boundaries delineated by legal concepts, with or without a co-existent physical marker. In the leading case of *Pasadena v. Alhambra*, 33 Cal. 2d 908, 921-23, the court found a groundwater basin to be separately adjudicable. In *Miller v. Jennings*, 243 F.2d 157, 159, the court indicated that a general adjudication could result among those only on the Upper Rio Grande. In *Arizona v. California*, 373 U.S. 546, this court entertained essentially a general adjudication of the Lower Colorado River Basin. Thus there can be no doubt of the efficacy of adjudicating that portion of a stream requiring such a supply and demand determination without adjudicating the whole. When there are two constructions of an act, one which allows the policy to be operative, and the other which would render the legislation valueless, the former should be accepted. "There is a presumption against a construction which would render a statute ineffective or inefficient" *Bird v. United States*, 187 U.S. 118, 124; See *Knapczyk v. Ribicoff*, 201 F. Supp. 283, 286 (N.D. Ill. 1962).

Ignoring the enormous jurisdictional problem, the impossible mechanical problems, the undermining of the express policy and purpose of the McCarran Amendment, there is a further reason to construe the Amendment to compel federal participation in the adjudication of any determinable unit of a water supply. Obviously

not all portions of a full hydrological unit develop uniformly and at the same time. Sub-units, divisible either legally or hydraulically, should be adjudicated when necessary, and neither before nor after. Requiring adjudication of 1,000 miles of river, or more, the inevitable result of the United States construction, will involve hundreds of claimants in adjudications when their unit may be either far from ripe or far-overripe. Clearly this result should be avoided.

To construe the statute to require adjudication of an entire basin renders the McCarran Amendment a nullity, creates an absurd result, and could impose costly and wasteful litigation on those who do not require an adjudication. To hold that the statute is applicable to waive sovereign immunity as to individual determinable units makes the statute a useful and rational tool for the development of state and national water use planning. There should be no question as to the reasonable intent of Congress and interpretation of the act.

The United States' final attempt to rationalize their position is that the interpretation urged herein would subject them to continual litigation. But the government's burden is directly proportional to their land holdings and water claims, a problem which all landowners of great size must face. The Court would not accept the argument that because one of the government's parcels is involved in a quiet title action, all of its property must be included. The Government's contention as to water rights is substantially identical.

II

The McCarran Amendment Waives Sovereign Immunity as to Reserved Rights

The reserved rights of the United States are subject to adjudication under the McCarran Amendment.

As noted, *supra*, the purpose of a water adjudication, and of the McCarran Amendment, is to adjust supply and demand as to *all* claimants within a determinable unit. Realistic water planning requires that all demands be identified and quantified. This fact was repeatedly voiced in debates concerning the McCarran amendment.

"S. 18 . . . is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. *This is so because unless all of the Parties owning or in the process of acquiring water rights in a particular stream can be joined as parties defendant, any subsequent decree would be of little value.*" Senate Report No. 755, 82nd Cong., 1st Sess., p. 9 (1951). (Emphasis added.)

Senator McCarran stated:

"If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results.

"The necessity that all owners or claimants of water rights on a given stream be joined in a suit for the adjudication of water rights is conceded.

... I direct attention to this point to show that the Department of Justice admits that in order to get a proper and complete adjudication of the water rights of a given stream or water source, it is necessary to join all the parties having or claiming to have an interest in the waters of said stream." 97 Cong. Rec. 12948 (1951).

The committee report provided:

"In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State

law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." 98 Cong. Rec. 122 (1952).

Clearly, the Congress recognized keenly that one claimant free from the effects of an adjudication can render an adjudication null. Yet the interpretation urged by the United States would ignore this point, repeatedly made by the Congress, and thus emasculate 43 U.S.C. 666. In every western state, the United States holds vast parcels with reserved rights. To hold these free from adjudication causes a perpetual cloud on reasonable water management through adjudications, the very end sought by the McCarran Amendment.

The United States contends that the water rights to be adjudicated under the McCarran Amendment waiver are solely those which the United States acquires under state law, and that reserved rights are not obtained pursuant to state law and thus are exempt from the waiver. But the Amendment offers two situations in which immunity is waived:

"(1) for the adjudication of rights to the use of water of a river system or other source, *or* (2) for the administration of such rights, *where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law. . . .*" 43 U.S.C. 666. (Emphasis added.)

The United States appends the condition of acquisition under state law to the first alternative as well as to the second.

While such a construction is possible, it is equally possible that that clause is linked solely to the second alternative.

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' " *Richards v. United States*, 369 U.S. 1, 11 (1962).

There can be no question but that the latter interpretation achieves the statutory intent, while the former ignores the clear purpose of the Amendment.

This interpretation is reinforced by the second sentence of 43 U.S.C. 666. That sentence states:

"The United States, when a party to any such suit, shall be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . ."

As reserved rights result as the result of sovereignty, the authors provided that the right to plead such sovereignty as a defense to an adjudication is lost. Thus the reserved rights may be determined by the Court.

The United States appears to argue that by submitting their reserved rights to the State Court, they may be subject to the rules of appropriation and thus may not be able to perfect water rights for their land owner-ships. Assuming *arguendo* the existence of a "reserved right," amicus does not understand this to be the law.

In *Arizona v. California*, 373 U.S. 546, 598-601, this Court held that these rights are subject to *quantification* by the Court based upon appropriate estimates of future needs, regardless of whether actual use in that amount has occurred on federally-owned lands. The mere fact that the Court has quantified these rights to affix a demand for resource development is a useful and desirable end for resource development.

Conclusion

Amicus respectfully submits that the McCarran Amendment waives the sovereign immunity of the United States as to any determinable unit subject to a general adjudication and that as part of such an adjudication, the reserved rights of the United States may in fact be qualified. The decision of the Court below should, therefore, be affirmed.

Dated: June 12, 1970.

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**In the Supreme Court of the
United States**

October Term, 1969

No. [REDACTED]

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88

UNITED STATES, PETITIONER

v.

**THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF
COLORADO**

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF COLORADO**

Amicus Curiae Brief for the State of Utah

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STATE OF COLORADO

Amicus Curiae Brief for the State of Utah

STATEMENT OF INTEREST

Utah, as most other Western states, has a comprehensive system for water administration, which includes procedures for the appropriation, adjudication and distribution of water, Chapters 1 through 5, inclu-

sive, Title 73, Utah Code Annotated, 1953, Replacement Volume 7B. This system is vital to the orderly utilization of the water in this state, and proceedings for the general adjudication of water rights forms an important element of this program. Under present procedures the only way a complete record of all rights can be realized is through a general adjudication proceedings. The decrees that result from these proceedings provide an integrated record of the water users' rights, serve as a basis for achieving proper distribution among existing users from a water source, and also provide a basis to determine whether water is available to be appropriated for new uses. There are a number of such actions presently in process in various areas of the state. Because the United States has many uses of water within the state, including uses on Forest lands, the inclusion of all of the rights of the United States in these general adjudication proceedings is a matter of fundamental importance to the State of Utah. Consequently, the State of Utah is vitally interested in preserving a water right adjudication procedure that will allow for the complete adjudication of all rights claimed by a water user.

Whether or not Water District 37 constitutes a "river system" as defined by 43 U.S.C. 666 is beyond the scope of this brief.

Further, it is submitted that the determination of the existence, non-existence or the extent of "reserved rights" is not properly before this Court at this time. Determination of that issue should only come after the jurisdictional question has been answered and the Colorado Court has been allowed to adjudicate the

Eagle River System upon the facts submitted in that action. Then, and only then, is the proper time for this Court to review the validity of the Colorado Court's decision concerning the Reservation Rights.

ARGUMENT

THE McCARRAN AMENDMENT, 45 U.S.C. 666, ALLOWS FOR THE JOINDER OF THE UNITED STATES OF AMERICA IN A PROPER GENERAL ADJUDICATION PROCEEDINGS TO DETERMINE ALL OF THE WATER RIGHTS CLAIMED BY THE UNITED STATES.

With increasing development and added demands for water in the West, there developed a corresponding need to define and settle the individual water rights among the users of a common water supply. The lack of a complete record and evaluation of all rights from a water source made effective water right administration difficult or impossible, and also caused title uncertainty between individual users. This was so because absent such a record the integration of the individual rights which is necessary to insure the proper distribution of water between users was not possible, and also without knowing the extent of existing rights the amount of water that was available for appropriation to new uses was unknown. Further, because of the close interrelationship of the rights, it was necessary that all of the rights be evaluated in order that the various users could know the extent of their rights to a common water supply. Historically, private lawsuits

between various individuals had simply failed to accomplish an effective adjudication of rights from a water source because such actions did not encompass all uses. This resulted in a multiplicity of individual lawsuits to solve continuing water right problems but the net effect was still title uncertainty between the users in many cases, *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447-449 (1915); also see Hutchins, *Selected Problems in the Law of Water Rights in the West*, U.S. Dept. of Agriculture, Misc. Pub. No. 418, pp. 74-78 (1942).

Therefore it was apparent that there existed a need for a comprehensive adjudication procedure that would provide the means to fully evaluate and integrate all facets of the numerous rights from a given water source. The "general adjudication" or "general determination" proceeding, as it is commonly known in the West, developed to fill this need. Under the laws of the Western states, procedures now exist whereby water users or state officials can initiate judicial proceedings to obtain a determination of the respective water rights of water users on a particular river or other water system. Due to the priority concept of the appropriation doctrine, if any such general adjudication of water rights is to be effective, it is imperative that all water users from a single source of supply be joined in the action and bound by the results. Further, it is equally imperative that all of the users who are joined be required to submit all of their claims for adjudication.

Unfortunately, prior to the enactment of the McCarran Amendment, 43 U.S.C. 666, the objectives of a general adjudication proceedings could not be accom-

plished where uses of the United States were involved. The United States, because of sovereign immunity, could not be joined in such adjudications. Since the United States claims the right to initiate unknown and undetermined future uses, other water users had no assurance or security that their current water supply would remain intact. This left the predicability of future water supplies in an unstable and intolerable confused state among water users and prevented effective water right administration.

The McCarran Amendment, 43 U.S.C. 666, was specifically enacted to remedy this situation and to allow the objectives of a general adjudication proceeding to be accomplished. This section provides in part:

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit shall (1) be deemed to waive any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

To now adopt the position advocated by the United States that under this statute it is only required to submit a part of its rights for determination would be to return to the very administrative frustration and title uncertainty that the general adjudication procedure was specifically designed to avoid. Certainly no one familiar with such actions ever suspected that a claimant could be required to appear but could only be required to assert a portion of his rights to a particular water source. Such a result would destroy the value of this type of proceeding just as effectively as not having a party before the court. What is sought in such an action is an adjudication of all of the rights of the parties to the action, not merely part of the rights of all of the parties.

The legislative history of the McCarran Amendment clearly indicates that it was enacted because of this problem and to allow an effective determination of *all water rights*. This is perhaps best illustrated by the report of the Senate Judiciary Committee which states:

"In the administration of and the adjudication of water rights under state laws, the state courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on the stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a state court, such claims could materially interfere with

the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts." (Emphasis added) Senate Report No. 775, 82d Cong., 1st Sess. (1951).

It is clear that this Committee was cognizant of the nature, scope and objectives of a general adjudication proceedings since it specifically referred to the case of *Pacific Live Stock Co. v. Oregon Water Board*, supra, wherein the constitutionality of the Oregon statutory general adjudication procedure was upheld. This Committee in discussing the result on state procedure if the government was to maintain its position of immunity stated:

"If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of *Pacific Livestock Co. v. Oregon Water Board* (241 U.S. 447):

'All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the

testimony of witnesses with its recognized infirmities and uncertainties; and third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.' "

The absolute necessity of joining the United States to achieve effective adjudication of water rights was reiterated later in the report:

"Since it is clear that the states have the control of the water in their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper administration of the water law as it has developed over the years.

* * *

"The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the court in the same manner as if it were a private individual."

Subsequent to the enactment of this legislation this court in *Dugan v. Rank*, 372 U.S. 609, 618-619 (1963) in concluding that a particular action which had arisen in California was not within the purview of the McCarran Amendment because it was a private action and not a general adjudication, briefly discussed the scope of the McCarran Amendment in the following terms:

"It is sufficient to say that the provision of the McCarran amendment, 66 Stat 560, 43 U.S.C. § 666, relied upon by respondents and providing that the United States may be joined in suits 'for the adjudication of rights to the use of water

of a river system or other source,' is not applicable here. Rather than a case involving a *general* adjudication of 'all of the rights of various owners on a given stream,' S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to the appropriative and prescriptive rights asserted."

In summary, it seems indisputable that the purpose of the McCarran Amendment was to make possible an effective determination of all water rights from a single source of supply. Under any other interpretation, the probability remains that any decree determining priorities and extent of rights will be ineffective and may later be overturned. The instability in water rights adjudication was the very evil the measure was designed to eliminate. The position of the United States that it may withhold part of its rights from determination must come as a surprise to everyone who thought they understood the scope and meaning of a "general adjudication" action. It is of little value to make someone a party to such litigation if the court cannot adjudicate all of his rights.

The United States urges this Court to construe the McCarran Amendment to preclude proper adjudication of all water rights. It argues that the prepositional phrases referring to modes of acquisition—that is, (a) "by appropriation under state law," (b) "by purchase," (c) "by exchange," and (d) "or otherwise,"

—modify and qualify the phrase “the owner of.” So construed, federal ownership alone is not sufficient ground to justify joinder of the United States in a water adjudication suit. Rather, on this view, the United States may be joined only if it acquired the pertinent water rights by one of the specified modes of acquisition. They claim that reserved water rights have not been acquired by means of “appropriation,” “purchase” or “exchange,” which are modes of acquisition under state law, and that the rule of *ejusdem generis* limits the denotation of “or otherwise” only to other means of acquisition under state law. Inasmuch as reserved water rights are not acquired pursuant to state laws, the government argues, the Act does not authorize joinder of the United States in water rights adjudications concerning reserved rights. Whatever technical merits this interpretation may have, it is clearly erroneous. Such an interpretation frustrates the stated purpose of the McCarran Amendment, perpetuating the very evil it was designed to correct.

The statutory language is susceptible of a different, more reasonable interpretation which implements the purposes of the Act. The phrase “the owner of” should be accorded general application and *not* be qualified by the phrases referring to the specified modes of acquisition.

Thus construed, the statute would be read as follows:

Consent is given to join the United States as a defendant in any suit where it appears that the United States [1] is the owner of [water rights] or [2] is in the process of acquiring water

rights by [a] appropriations under state law, [b] by purchase, [c] by exchange, or [d] or otherwise.

This interpretation is supported by the doctrine of the "last antecedent" which holds that relative and qualifying words, phrases, and clauses are to be applied to the words or phrases *immediately* preceding, and are not to be construed as extending to or including others more remote, *United States v. Hughes*, 116 F.2d 613 (1940) and *City of Santa Barbara v. Maher*, 77 P.2d 306 (1938). Under this rule, phrases [a], [b], [c], and [d] are applied only to the immediately preceding phrase, "is in the process of acquiring water rights" and *not* to the more remote phrase "the owner of." This interpretation would allow joinder of the United States in water rights adjudication on the basis of ownership alone regardless of the source of that ownership.

The same result can be achieved by rejecting the government's application of the rule of *ejusdem generis* to the phrase "or otherwise." The government's argument that this phrase must be limited to modes of water rights acquisition under state law is not well founded in that "purchase" and "exchange" are not peculiarly modes of acquisition under state law as is appropriation. In fact, the United States has asserted the claim that "when the United States acquired ownership of the public domain by cession from foreign sovereigns, it acquired the rights to use waters thereon within the bundle of rights which ownership of the lands involves," Katzenbach, Deputy Attorney General, in Hearings before the Subcommittee on Irrigation and Reclamation of the Interior and Insular Affairs, U. S. Senate,

on S. 1275, p. 11 (1964). This claim is also asserted by the United States in its brief in this case, p. 20-21.¹ Certain of those "cessions" upon which the reserved rights are claimed were "purchases." If the United States were to "exchange" public lands for lands on an Indian reservation, it would undoubtedly assert that there was not a relinquishment of whatever water rights those Indian lands might have. In neither example are the rights being claimed acquired "by appropriation under state law."

To accept the interpretation of the United States would render the phrases "by purchase" and "by exchange" meaningless, inasmuch as, according to the United States, these terms are included in "by appropriation under state law." Such a construction would violate the presumption that the legislature intends that each word in a statute should have some meaning all its own, and is included in the statute for a particular purpose. Thus, it seems more reasonable that [a], [b], and [c] be construed as members of the general class of modes of water rights acquisition and [d] "or otherwise" serving to complete or exhaust that class. So construed, the Act would extend to adjudication of all types of federal water rights.

It seems apparent that the language in question is amenable to more than one interpretation and hence must be given that which will best effect its purpose rather than one which would defeat it, *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934).

¹ It should be noted at this point that the State of Utah does not acknowledge the validity of this argument of the United States.

Concerning the use of the various rules of statutory construction this court has stated:

"However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Securities and Exchange Commission v. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943).

As this Court has often held in construing a statute, to give effect to the intent or purpose of the legislature, the Court must look to the object to be accomplished and the evil or mischief sought to be remedied, *United States v. Byron*, 339 U.S. 323, 338 (1950), rehearing denied 339 U.S. 991 (1950). In ascertaining the legislative intent and purpose, it is necessary and proper to look to the purpose to be subserved by the statute, and, if possible, construe the statute so that it will accomplish that purpose. In *Helvering v. N. Y. Trust Co.*, 292 U.S. 455, 464-465 (1934), it was observed in this regard:

"The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commission of Immigration v. Gottlieb*, 265 U.S. 310, 313. *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 37. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would

often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown v. Duchesne*, 19 How. 183, this court said (p. 194): 'It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take a connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' Quite recently in *Ozawa v. United States*, 260 U.S. 178, we said (p. 194): 'It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.' And in *Barrett v. Van Pelt*, 268 U.S. 85, 90, we applied the rule laid down in *People v. Utica Ins. Co.*, 15 Johns. 358, 381, that 'a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers.' "

The McCarran Amendment was enacted to allow a comprehensive determination of water rights which would eliminate uncertainty and confusion between water users and allow for efficient water right administration. To allow the United States to withhold a

portion of its claimed water rights from such proceedings would certainly destroy the effectiveness of such an action and would defeat the very purpose of this legislation. While it is clear that there is no right to sue the United States without its consent, it must be equally clear that where consent has been given, the terms of the consent must not be interpreted in such a way that the very purpose sought to be achieved by granting consent is defeated.

The anomalous consequence of the government's construction of the Act focuses attention on a fundamental inconsistency in the government's position. On the one hand, the government resists the jurisdiction of the Colorado district court on the grounds that the action is not a general adjudication of all purported water rights on an entire river system. The United States, it urges, may not be subjected to piecemeal litigation in the resolution of its water rights. But in the next breath, the government argues that the McCarran Amendment should be construed to allow determination of only federal appropriative rights and no federal reserved rights, thus precluding the possibility of a complete general adjudication.

CONCLUSION

For the foregoing reasons 43 U.S.C. 666 should be interpreted as requiring the United States of America to submit all of its claims in a general adjudication

proceeding and the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vernon B. Romney, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of the State of Colorado, State Capitol Building, Denver, Colorado 80203; Delaney & Balcomb, P. O. Drawer 790, Glenwood Springs, Colorado 81601, attorneys for the District Court in and for Eagle County, State of Colorado and the Judge thereof; Miller & Ruyle, 1004 A 9th Ave., Greeley, Colorado 80631, attorneys for Central Colorado Water Conservancy District; George L. Zoellner, 144 West Colfax Ave., Denver, Colorado 80202, attorney for City and County of Denver, acting by and through its Board of Water Commissioners; and Raphael J. Moses, P. O. Box 34, Boulder, Colorado 80302, attorney for New Jersey Zinc Company; by mailing the same, airmail postage prepaid to their respective offices, this 11th day of July, 1970 all in accordance with the rules of this Court.

VERNON B. ROMNEY
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SUPREME COURT, U.S.

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**In the
Supreme Court of
The United States**

October Term, 1969

No. 11

87

UNITED STATES, Petitioner

v.

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF COLORADO

AMICUS CURIAE BRIEF FOR THE
STATE OF WYOMING

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**In the
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October Term, 1969

No. 1178

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
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*ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF COLORADO*

**AMICUS CURIAE BRIEF FOR THE
STATE OF WYOMING**

STATEMENT

For purposes of this Brief, the State of Wyoming adopts the first five sections of the Brief of the Petitioner, the United States. Specifically, the **OPINION BELOW, JURISDICTION, QUESTIONS PRESENTED, STATUTE INVOLVED, and STATEMENT.**

STATEMENT OF INTEREST

The unadorned issue in this case is whether or not the U.S.D.A. Forest Service must use water on reserved lands in the arid West within the framework of state water law?

The Federal Government owns 48 percent of Wyoming's surface. As the result of that ownership, the Federal Government potentially controls an even larger percentage of the total available water supply in Wyoming. This is because much of the federal ownership is in the mountainous areas of the State where there is an abnormally high rainfall.

Because the results in this case may also be controlling in Wyoming, and because a holding for the United States would have a very substantial effect on the administration of Wyoming water law, the State of Wyoming files this Brief in an effort to preclude partial or total abrogation by this Court of its State created body of water law.

The sine qua non of effective governmental administration of a limited resource is control of all of the resource. Wyoming can no more effectively control half of the water in the State than the Federal Government can control the monetary system if Wyoming is granted a license to counterfeit.

SUMMARY OF ARGUMENT

I

Congress could not have specifically intended that the McCarran Amendment be applicable to reserved rights because reserved rights were nonexistent when the McCarran Amendment was passed. Given the plain wording of the statute and the fact that the law's sponsors were from Nevada and Utah, very arid States, the only logical conclusion is that Congress would have applied the McCarran Amendment to reserved rights if reserved rights

existed when the law was enacted. A holding that the McCarran Amendment is inapplicable to reserved rights will make all state created water rights, regardless of priority, inferior to reserved rights because of a procedural quirk.

II

This case is not justiciable because the Court cannot fashion a workable remedy. In addition, the Court should not decide this case because Congress is presently making extensive investigations via the Public Land Law Review Commission preparatory to enacting legislation in the area involved in this case.

III

The reservation doctrine is a creature of this Court, and was created without a pretext of statutory authority. As such, this Court can and should abrogate reserved rights because of the major undesirable impact an efficacious reserved rights doctrine will have on the established economics of Western States. This result can be justified because the extension of the Winters Doctrine to *Arizona v. California* overlooked the fact that *Winters* was grounded on policy of giving special consideration to the Indians; a premise that did not exist in *Arizona v. California*. In addition, a viable reservation doctrine will constitute a total failure to the Federal Government to honor an implied promise made to thousands of homesteaders; "if you develop the land by applying water to it you can have the land and the right to use the water."

IV

When the Federal Government takes water out of priority, it violates the Fifth Amendment prohibition against uncompensated taking for public purposes.

ARGUMENT

I

APPLICATION OF THE McCARRAN AMENDMENT

A. To be completely candid, when the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, was enacted on July 10, 1952, Congress did not intend to include reserved rights within the ambit of that legislation. It could not. The reserved rights doctrine, as the United States wants it interpreted, did not exist on July 10, 1952.

The contemporary reserved rights doctrine was created on June 3, 1963, the date of the decision in *Arizona v. California*, 373 U.S. 546 (1963). It is not clear from the United States Brief what kind of reserved rights the United States opts for in the instant case.¹ It is possible to determine, however, two kinds of reserved rights that the United States does not seek. One is the kind of right represented by *F.P.C. v. Oregon*, 349 U.S. 435 (1955) (otherwise known as the *Pelton Dam* decision). In its argument supporting the validity of the reserved rights doctrine, the United States does not rely on the *Pelton Dam* decision.² The second potential kind of reserved rights which the United States could not logically be pursuing here are

¹ In this connection, it is important to recognize that there may be several kinds of reserved rights. Charles F. Wheatley, Jr., describes five kinds of reserved water rights in a recent study dealing with water resources prepared for the Public Land Law Review Commission. As Mr. Wheatley points out, a sixth kind of reserved right may exist depending upon one's view of *Winters v. United States*, 207 U.S. 564 (1908). C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, at 80-84 (1969).

² See Brief for the United States at 9.

Winters Doctrine rights. There are no Indian reservations in the Eagle River system.³ This last point is important because Winters Doctrine rights are the principal kind of reserved rights which predate the McCarran Amendment. Because the United States appears, in this case, to be claiming only the kind of reserved rights represented by *Arizona v. California*, it follows that Congress could not have intended anything pro or con vis-a-vis the McCarran Amendment and the rights claimed by the United States in this case, consequently the rights involved here could not have been within the ken of Congress until ten and one-half years following Congressional enactment of the McCarran Amendment.

That being so, the only thing this Court can determine is, would the Congress have included reserved rights in the McCarran Amendment if *Arizona v. California* had been decided prior to enactment of the McCarran Amendment? Unfortunately, this is the kind of exercise in semantics and legal reasoning which permits a variety of results; all points of view can be sustained.

For example, from the United States' viewpoint, it can be argued that the Winters Doctrine was extant when the McCarran Amendment was enacted. The Winters Doctrine is a reservation doctrine, and it cannot be assumed that Congress was unaware of *Winters v. United States*, 207 U.S. 564 (1908); therefore, the failure of Congress to include Winters Doctrine rights in the McCarran Amendment manifests an intent on the part of Congress, not to include any reserved rights in this legislation. The fallacies with that position are twofold. First, the Winters Doctrine was in fact rather obscure in 1952; Congress could easily have overlooked a 44-year old Supreme Court case. Second,

³ AMERICAN HERITAGE, THE AMERICAN HERITAGE BOOK OF INDIANS, 406-07 (1961).

and more persuasive, Congress was dealing with a legislative waiver of the sovereign immunity of the United States. It would have been inconsistent with the United States' duty as the Indians guardian to have included Winters Doctrine rights in this legislation.⁴

Another argument is that if Congress is to legislate away the sovereign immunity of the United States, it must do so with specificity; i.e., it must specify reserved rights in the statutory language. It seems this argument must fail because Congress lacked the clairvoyance to legislate concerning a doctrine that was not to come into existence until after enactment of the McCarran Amendment.⁵ Apparently not even the U.S. Department of Agriculture, the Federal Government's most ardent advocate of the reserved rights doctrine, believed the reserved rights doctrine existed in 1952 when the McCarran Amendment was enacted. Until 1965 the Forest Service Manual directed its field personnel to perfect water rights in compliance with state law.⁶ A review of the records of the Wyoming State Engineer's Office reveals that between 1960 and 1965, the Forest Service—as the sole applicant, initiated 46 applications for permits to develop water rights in accordance with Wyoming law within national forests.⁷ The latest applications filed by the Forest Service for permits to perfect

⁴ E.g., *U.S. v. Osage County*, 251 U.S. 128 (1919).

⁵ The McCarran Amendment was enacted July 10, 1952. The *Pelton Dam* decision was decided June 6, 1955, and *Arizona v. California* was decided June 3, 1963.

⁶ Note, *Water in the Woods: The Reserved-Rights Doctrine and National Forest Lands*, 20 STAN. L. REV. 1187, 1193-95, citing THE FOREST SERVICE MANUAL (1933), *Id.*, (1936), *Id.* at § 2541.03 (1965).

⁷ Report entitled *Forest Service Filings Since 1960*, on file in the office of the Wyoming State Engineer.

water rights in a national forest in Wyoming were 4 applications filed on April 7, 1965.⁸ How can it be argued that Congress should have been aware of the reservation doctrine in 1952, if the Forest Service, the primary proponent of the doctrine did not discover it until 1965?

This leaves us with the specific language of the legislation being considered. A careful reading of the language conveys the apparent clear intent of Congress to make the McCarran Amendment as all inclusive as possible, given the fact that Congress could not have been aware of the *Pelton Dam* or *Arizona v. California* decisions. In the first phrase of the first sentence, Congress has declared that the waiver involved applies to "any suit."⁹ It is difficult to imagine a more inclusive, less equivocating, single word than "any." It seems a reasonable interpretation of Congressional intent to assume that "any suit" means what it says, and that Congress thereby intended that the United States should be a party to "any suits" in the Western United States for adjudication of water.

In the second sentence of the statute, the same all inclusive language appears again: "when a party to *any* such suit, [the United States] . . . shall (1) be deemed to have waived *any* right."¹⁰ Again Congress has not equivocated. It simply is not reasonable to read "any right"

⁸ These four applications, Permits Nos. 22762, 22763, 22764 and 22771, were submitted over the signature of John S. Mead, Regional Engineer for the Department of Agriculture in Denver, Colorado. Permits Nos. 22762, 22763 and 22771 were for diversions and use in the Big Horn National Forest. Permit No. 22764 was for diversion and use in the Black Hills National Forest. Permits Nos. 22762 and 22763 were for domestic use. Permit No. 22764 was for stock water use. Permit No. 22771 was for domestic (recreation) use.

⁹ 66 Stat. 560, 43 U.S.C. 666.

¹⁰ *Id.* (Emphasis added).

to mean "any right except rights not perfected pursuant to state law"! Congress intended that *all interests* be included in Western water adjudication procedures, and said so.

The United States has argued that the McCarran Amendment does not apply to it unless an "entire river system" is being adjudicated. That the statute does not include the word "entire" is patent. That Congress was trying to make the statute as broad as possible is also evident for the phrase "river system" is followed by the all inclusive phraseology "or other source."¹¹ It seems obvious that Congress was unimpressed by the Justice Department's objection to a multiplicity of actions. The phraseology "or other source" implies that as far as Congress was concerned, the United States was to be a party to adjudication of a Western water right from any source, springs through river systems inclusive.

It has been argued that there was no Congressional intent to include the United States in adjudications of Western water rights where the United States' rights were based on the doctrine of reserved rights. It has been demonstrated above that this position must fail because Congress could not have enacted the McCarran Amendment with any awareness of the reserved rights doctrine, as that theory was not articulated by this Court until three years (the *Pelton Dam* decision in 1955) or ten and one-half years (*Arizona v. California* in 1963) after enactment of the legislation. The argument also overlooks the all inclusive language of the statute; the United States is a proper party if it owns or is in the process of acquiring water rights "under state law, by purchase, by exchange, or otherwise."¹²

¹¹ 66 Stat. 560, 43 U.S.C. 666.

¹² *Id.* (Emphasis added).

This legislation was sponsored by Senators McCarran of Nevada and Watkins of Utah. It may reasonably be assumed that those gentlemen were familiar with Western water law. It is inconceivable that the sponsors of this legislation could have intended that the United States, as owner of over 45 percent of the surface area of the eleven Western States,¹³ should not be included in the system of laws that controls a valuable and limited resource—water. To permit the United States to perfect water rights in the arid West outside the jurisdiction of the states, will make a shambles of Western water administration. It simply defies reason to assume the Senators from states as arid as Nevada and Utah could have intended such a result.¹⁴

B. Assume for argument's sake that the United States prevails in the instant case. This poses an interesting procedural question. The United States agrees that its reserved rights are "subject to water rights vested as of [the] . . . date [of withdrawal]." ¹⁵ If the McCarran Amendment does

¹³ C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, at 80-84 (1969). Page A-4 of the Appendix Table A-1 shows that the total area of the eleven Western States is 758,156,920 acres. Of this, 345,220,662 acres is Public Domain, or 45.5341%.

¹⁴ This is particularly evident upon closer examination of the WHEATLEY report (*supra* note 13), Appendix Tables A-1 and C-1. Both states lie primarily in the Great Basin. Nevada has the lowest average annual precipitation of any of the states. Appendix C, p. C-3. Utah has an estimated annual average precipitation of 11.5 inches, with the Great Basin averaging 5 to 9 inches per year. Approximately 85 percent of Nevada and 68 percent of Utah surface area is owned by the United States Government. F. Trelease, *Cases and Materials on Natural Resources* 362 (1965). Except for Alaska, no two states have a higher percentage of the land in Federal ownership. *Id.*

¹⁵ Brief for the United States at 9.

not apply to reserved rights, how does a private holder of a right senior to a reserved right get into court?

It would be naive to assume that the United States would not rely on a sovereign immunity defense in all cases if it prevails in the instant case.¹⁶ How does this private individual enforce his senior water right against the United States? The United States will not voluntarily recognize senior rights until a court of competent jurisdiction renders a decision that the private party does in fact hold a senior right.¹⁷ The dilemma is that if the United States prevails in this case, there will be no court of competent jurisdiction. The hypothetical situation presupposes the inapplicability of the McCarran Amendment to reserved rights, therefore, in a stream-wide adjudication in state court, the court will not have jurisdiction over the most important appropriator, the United States and

¹⁶ Cf., *Glenn v. United States*, Civil No. C-153-61 (D. Utah Mar. 16, 1963).

¹⁷ A specific example of the Forest Service's refusal to recognize valid senior rights occurred in the Medicine Bow National Forest in Wyoming in the summer of 1969. The Forest Service aided and abetted a contractor in the violation of Wyoming water law by diverting 300,000 gallons of water from the South Fork of Lodge Pole Creek. The water was to be used in construction work, within the Forest, at an interstate highway rest stop, which is not a purpose for which the Forest was reserved.

The reservation date was June 5, 1925, by Executive Order 4245. South Lodge Pole Creek has 8 adjudicated water rights with priorities earlier than 1925; in fact, 7 of these rights predated statehood, the earliest being 1874. The total of the 8 rights is 35.6 c.f.s.

It seems quite clear that the use of this water was in derogation of senior adjudicated rights. The Forest Service made no attempt to work with State water administration officials to keep this activity within State law, or even conform this usage to the Justice Department's view of reserved rights.

its reserved rights. Paradoxically the private holder of a senior right cannot obtain adjudication of his own prior right as against the United States or anyone else because of "the fact that all of the claimants to water rights along the river are not made parties." *Dugan v. Rank*, 372 U.S. 609, 618 (1963).

II

POLITICAL QUESTION

A. Both parties agree, as does the State of Wyoming, that the U. S. Supreme Court has jurisdiction to hear this appeal. Justiciability is another matter. Wyoming seriously doubts that the Court would find this matter justiciable if it knew the dimensions of the "can of worms" it is opening. Phrased another way, Wyoming questions the justiciability in this case based on tests 2, 3, 4 and 6 in Mr. Justice Brennan's opinion in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

"[T]he nonjusticiability issue centers on a determination of the kinds of things courts can and cannot do effectively."¹⁸ This is in essence Mr. Justice Brennan's test number 2.¹⁹

It is assumed that the *Arizona v. California* kind of

¹⁸ Laughlin, *Comments on Powell v. McCormack*, 17 U.C.L.A. L. REV. 113 (1969).

¹⁹ "[2] or a lack of judicially discoverable and manageable standards for resolving it;" 369 U.S. 186, at 217 (1962).

reserved rights are in issue here.²⁰ A holding that the McCarran Amendment is inapplicable to the *Arizona v. California* variety of reserved rights will be a beginning, not an ending. Above all, such a determination will not be an effective remedy.

That such a holding will abrogate over 100 years of Western water law is not the root problem here. Abrogation with concomitant replacement of the abrogated system may be justifiably distasteful to a great many people but that procedure is usually workable. People will function with rules they dislike in preference to no rules at all. Here we would have abrogation with a concomitant legal void. It seems of the upmost urgency to convey to the Court the fact that its replacement of Western water law, or the common law system of riparian rights, would be an unfair, highly unpopular, and distasteful result the

²⁰ As the reservation doctrine now stands, it includes Winters Doctrine rights. These have never posed much in the way of practical problems in the arid West because the Indians have been slow to develop sustained irrigation. There are the *Pelton Dam* kind of reserved rights which are grounded on no harm to other appropriators and no consumptive or out of basin water usage. It is this variety of reserved rights which Wyoming thinks the United States is disinterested in.

Finally, there is the kind of reserved right with an unlimited consumptive use of water that the Court created in *Arizona v. California*. Without doing violence to the Court's language, *Arizona v. California* can be read to be limited to the four specific federal areas enumerated, though most writers have given the language a wider connotation.

"We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest." 373 U.S. 546, 601 (1963).

populace could live with. The creation of a legal void is an entirely different matter.²¹

Because the Court usually cannot, in one stroke, enact an entire body of law, but can abrogate all or a major part of an existing system, it leaves unanswered a multitude of questions. If it assumes the role of Western Water Master, it may expect to answer literally hundreds of questions, some of which are enumerated here.

1. As between various reserved rights, who will have the better right inter se in times of shortage?
2. How will wasteful water practices be controlled? Who will have standing to litigate against wasteful uses of reserved rights, both as to consumptive uses and pollution?
3. As between reserved rights, Winters Doctrine rights, and state developed rights, what kind of rights will have preference (not to be confused with priority); domestic, fire fighting, irrigation, recreation, flood control, stock water, et al?
4. If Winters Doctrine rights and state created rights are treated differently vis-a-vis Forest Service rights, does this create an Equal Protection problem?
5. Can reserved rights be transferred out of basin?
6. Apparently "reserved rights" are federally owned property. Under the property clause, they can probably be transferred. Can the U.S. Department of Agriculture take a private party's junior water right then sell it back to him yearly?
7. Who will replace the very large administrative

²¹ Cf., footnote 17, *supra*.

organization created in the Western States to control and administer water in times of shortage?

8. How will a senior state right get a Forest Service junior upstream right turned off?
9. How about the reverse situation? Does the Court expect a county paid administrator to shut off a state perfected right in deference to a senior downstream Forest Service right or Indian right?
10. If the exercise of a "reserved right" renders a Bureau of Reclamation project uneconomical, will the landowner still be expected to pay off on his contract to the U.S. Department of Interior even though the U.S. Department of Agriculture created the circumstances which prevented the landowner from performing on his contract?

The foregoing is not intended to be anything like a full catalogue of future problems. Nor is it intended to convey the notion that a system of Federal Western Water Law could not be made to operate. It is intended to convey the idea, however, that the development of such a system is a legislative task suitable only for Congress. If the water users in the West, both private and federal, must await this Court's definition of a new body of Federal Western Water Law, case by case, we are just beginning a long and expensive judicial exercise. The Court may indeed make a determination in this case; but for reasons it cannot now control, it will not create an effective remedy if it upholds the United States.

The Court should, we believe, be particularly cognizant of the effect a holding in this case will have on existing interstate water compacts and Supreme Court decrees. For example, most of the interstate compacts in the West recognized and protected perfected water rights that were extant when the compacts were consummated. None of

these compacts or their negotiators anticipated reserved rights. What will be each state's obligation to account for reserved rights in determining its compact entitlement. Wyoming is entitled to 80 percent of the flow of the Big Horn River as measured below the last diversion from the river above its confluence with the Yellowstone River.²² This provision of the compact recognizes existing rights; i.e., it apportions unused and unappropriated water, as of December 8, 1950. The retroactive effect of reserved rights is totally inconsistent with the philosophy of the compact.

How will reserved rights be integrated with this Court's decree in *Nebraska v. Wyoming*?²³ Colorado and Wyoming have substantial reserved lands in the North Platte drainage; Nebraska does not. The decree limits both Colorado and Wyoming to specific irrigated acreages. As the Forest Service puts additional land under irrigation in the years ahead, must private Colorado and Wyoming irrigators take corresponding amounts of land out of production? In Wyoming such a result will most directly affect the Kendrick Project of the Bureau of Reclamation; i.e., the U.S. Department of Agriculture will be taking water from a Bureau of Reclamation project. If this practice is not followed, Nebraska will be obliged to bear the total burden of the exercise of any and all reserved rights that are implemented in Colorado or Wyoming, in the North Platte River drainage.

B. The other phase of the "political question" problem involved here is grounded on Mr. Justice Brennan's tests

²² Article V, Yellowstone River Compact.

²³ 325 U.S. 589 (1945); *Decree modified*, 345 U.S. 981 (1953).

numbers 3, 4 and 6 in *Baker v. Carr*.²⁴ The basis for the argument is the Congressional activity in the area involved in this case as manifested by the creation and work of the Public Land Law Review Commission.

The Public Land Law Review Commission is an investigative organization; fairly uncommon as a Commission of both the House of Representatives and the Senate. The Commission was created in 1964.²⁵ Originally it was to have a 5-year life, to expire six months after filing a report with the President and Congress on June 30, 1969. Congress extended its life one year and the report is now due June 30, 1970.²⁶ All indications are that the report will be filed by the June 30, 1970, deadline, and the Commission will go out of existence on December 31, 1970.

Although the final report of the Commission is presently a closely guarded secret, the scope of its activity and its purpose are not. The purpose of the broad and extensive investigation of the Commission is stated in the legislation:

"Congressional declaration of policy

It is hereby declared to be the policy of Congress that the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public.

²⁴ "[3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;". "[4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;". "[6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. 186, 217 (1962).

²⁵ Public Law 88-606, 78 Stat. 982 (1964), 43 U.S.C. §§ 1291-1400 (1964).

²⁶ Public Law 90-213, 81 Stat. 660 (1967).

"Review of public land laws

Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people and because administration of public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary."²⁷

Based on this imprimatur, Congress, through the Public Land Law Review Commission, has been investigating Federal Public Land Laws for six years, and has appropriated \$7,390,000 for the task. The general scope of the Commission activities and inquiry have been reasonably well documented.²⁸ The PLLRC negotiated a contract with Charles F. Wheatley, Jr., et al, for nearly \$100,000 to investigate the specific problems in issue in this case; i.e., water rights on public lands.²⁹ This study was initially supposed to cover:

²⁷ 43 U.S.C. §§ 1391-92 (1964).

²⁸ Phipps, *The PLLRC—A Challenge to the West*, 1 LAND & WATER L. REV. 355 (1966); Phipps, *The PLLRC—Identifying and Defining the Problems*, 2 LAND & WATER L. REV. 251 (1967); Phipps, *The PLLRC—Status Report*, 4 LAND & WATER L. REV. 297 (1969).

²⁹ Mr. Charles Conklin, Assistant Director of the Public Land Law Review Commission, quoted an expenditure of \$97,640,000 to date, on the Wheatley contract. This figure was quoted during a telephone conversation with Senator Hansen's office on June 15, 1970.

"Federal laws and policies relating to the use and management of water originating on or flowing across public lands for both federal and nonfederal uses . . . with particular attention being given to the implied reservation doctrine of federal water rights resulting from withdrawals and reservations of public lands. The study also includes an analysis of the relationship of land and resource management programs on the public lands to water yields and water quality to determine their effectiveness in providing for water uses on public lands and for local and regional water needs."³⁰

In addition to the considerable space directed to the reserved rights question, the Wheatley Report devotes ten pages to the McCarran Amendment.³¹

Grant that the Court should only legislate interstitially³² and given both the legislative scope of any opinion rendered by the Court in this case, as discussed in A above, plus Mr. Justice Brennan's tests 3, 4 and 6 in *Baker v. Carr*, the Court may be well advised to permit Congress the first opportunity to solve this problem. Our system works far better if the Court reviews Congressional Acts, rather than vice versa. Unhappily, any action the Congress now takes concerning reserved rights will be a review, at least partially judicial in nature. Congress really has no choice vis-a-vis the reserved rights doctrine unless it abdicates the field to the Court, an unpleasant prospect given the usually

³⁰ Phipps, *The PLLRC—Identifying and Defining the Problems*, 2 LAND & WATER L. REV. 251, at 267-68 (1967).

³¹ C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, at 189 to 199 (1969).

³² *Arizona v. California*, 373 U.S. 546, 628 (1963) (Justice Douglas' dissenting opinion).

unsatisfactory quality of judicial legislation. Rather than compound the problem, it would seem desirable to give Congress the first opportunity to perform its designated function with the McCarran Amendment problem rather than have Congress sit in review of the Court's action.

Finally, a comparison of the scope of the investigation of the PLLRC dealing directly with the problems in issue as compared with the information available to the Court, plus the relative investigative abilities of the Congress as compared to the Court, should, we think, be an indication of the wisdom of a holding that this case lacks justiciability because it presents a political question.

III

RESERVATION DOCTRINE

A. The genesis of the reserved rights doctrine is generally conceded to be *Winters v. United States*, 207 U.S. 564 (1908). The next and only other really significant case involved in the evolution of the doctrine is *Arizona v. California*, 373 U.S. 546 (1963).³³

The view of many people in the Western States who are close to and familiar with Western water law and Western water problems, is that the holding in *Arizona v. California* was wrong vis-a-vis reserved rights, not only for what that holding did, but for what it failed to do. Many Western water lawyers' candid reaction would be that the Court did not comprehend the magnitude of its

³³ Apparently the United States would agree with this statement. *Cf.*, Brief for the United States at 6.

holding. If it had, it would have either reached a different result or been far more thorough and detailed in supporting the result it did reach.

The magnitude of the *Arizona v. California* holding does indeed justify comment:

"[W]ater rights have already vested in private persons for the irrigation of eighteen million acres of land and . . . private property values dependent upon these vested rights are estimated at between fifteen and twenty billions of dollars."³⁴

Now consider that in two brief sentences, without benefit of any reasoned legal argument, citation of any case law, or statutory authority, the Court cast a huge cloud of undelineated proportions on the majority, and probably all, of the 18 million acres of land mentioned above. The Court's language bears repeating:

"The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."³⁵

Unhappily, the Master's Report is equally unenlightening. On pages 292 and 293, the Master concludes that the

³⁴ Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 631 (1957), citing, 1 COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT WATER RESOURCES AND POWER, 15 (1955).

³⁵ *Arizona v. California*, 373 U.S. 546, 601 (1963).

United States "had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area." We agree. That the United States *Congress* has such power and authority appears correct, given proper constitutional restraints. In the next paragraph, the first full paragraph, on page 293, the Master goes on to find that "I have found that the United States intended to reserve water for the area."

WHERE? WHEN? HOW?

The owners of \$20 billion of property rights were certainly entitled to a more comprehensive explanation than the Court or the Master provided here. This Court has very accurately stated the basic proposition:

"To convert [an unexercised power of Congress] . . . to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose. We find none."³⁶

Unhappily, in *Arizona v. California*, the Court did not conduct the same search that it appears to have undertaken in the *Niagara Mohawk Power* case.

It is hoped that the Court will not overlook the fact that there is no citation to *any statutory authority* to support the reserved rights in:

1. The Brief of the United States in this case.
2. The Court's opinion in *Arizona v. California* in support of the extension of the Winters Doctrine to the other Federal Reservations.
3. The Master's Report in *Arizona v. California* in support of his extension of the Winters Doctrine to the Lake Mead National Recreation Area.

³⁶ *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252-53 (1954).

The sole authority in support of the *Arizona v. California* variety of reserved rights is *Winters*. The decision in the *Winters* case is not supported by any statutory authority. It is perhaps rhetorical to ask, why has not a statutory authority been cited to support an action which has such broad implications? Obviously no Congressional action has been relied upon because no such action has ever been taken.

As stated above, we agree with the Master in *Arizona v. California* that the United States probably did, and does, have the power, within constitutional limits, to reserve water for its national forests when it sets them aside. That is, we agree that the United States has the power as it is exercised through the legislative process. The Master did not elaborate on the question of where he felt that power lay. The problem that vexes the Western States is that the Congress has never exercised that power. *That power has been exercised solely by this Court!* This is particularly unfortunate because, as discussed elsewhere, there is a serious constitutional question surrounding the reservation doctrine. Can the people who believe the reserved rights doctrine may violate the United States Constitution, anticipate an objective hearing from the same body that enacted the law or doctrine being called into question?

Consider the other side of the coin. Has there been any Congressional action which would indicate Congress did not intend to reserve water for use on reserved lands when it made the original reservation? The answer is of course that there is abundant authority to demonstrate a Congressional philosophy that runs counter to the reservation doctrine.

Mr. Charles E. Corker, in a discussion of the *Pelton Dam* decision, correctly observed that: "the Court [did not] . . . heed . . . the almost unbroken line of statutes by

which Congress has deferred to state laws respecting water rights."³⁷ In support of his statement, Mr. Corker cites 26 laws enacted by Congress.³⁸

A more blunt but equally accurate comment was made in a Law Review article dealing with *Arizona v. California*:

"[T]he opinion in *Arizona v. California* reflects a doctrinaire conceptualism that has dominated a majority of the Court for twenty years. Since the *First Iowa* case the Court has uniformly overridden congressional attempts to establish a system for state and federal governments to share the decision-making power on water resource development. The system Congress seemingly adopted was the double veto; the Court, however, has uniformly eliminated the state veto. A brief review of the leading cases will sustain the contention that the Court steadfastly adheres to the view that the decision-making power in water resource allocation should be an exclusive federal function, regardless of what Congress says.

* * *

"This review of the principal cases concerned with federal-state relations in water resource development leads the author to the conclusion that neither judicial precedent nor legislative history nor administrative construction nor even the plain meaning of the statute will stand in the Court's way of allocating exclusive decision-making power on water resource development to the federal government."³⁹

³⁷ Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 613 (1957).

³⁸ *Id.* at 613. Footnote 27.

³⁹ Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 61, 65 (1966).

As both authors point out, the Court has consistently cast aside all arguments supporting state control of Western water, notwithstanding numerous Acts of Congress which bespeak a Congressional philosophy totally inconsistent with the reserved rights doctrine. These decisions have uniformly been made with little or no statutory support for the result.

The Court has consistently held that the three Acts of Congress most generally cited to support state control of Western water, Act of July 26, 1866, 14 Stat. 253; Act of July 9, 1870, 16 Stat. 218; and the Desert Land Act of 1877, 19 Stat. 377; do not apply to reserved lands.⁴⁰ The rationale has always been that those Acts dealt only with public lands. How could Congress have enacted laws in 1877 excepting reserved lands, as opposed to other public lands, when the concept of reserved forest lands did not come into the law until 1891?⁴¹ In 1866, 1870 and 1877 all lands in the West not in private ownership were public lands. In 1891, with the repeal of the Timber Culture Acts, the concept of forest reserves came into the law.⁴²

It seems fair to conclude, particularly in view of the total absence of any statutory authority supporting the reservation doctrine, that if Congress meant to change the Western water law philosophy as expressed by the Desert Land Act, it would have expressly said so. A closer inspection of *all* of the law which created a national forest policy, lends strong support to the argument that Congress had no such intent.

⁴⁰ *E.g., F.P.C. v. Oregon*, 349 U.S. 435 (1955).

⁴¹ 26 Stat. 1095, 1103 (1891).

⁴² B. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES*, 530 (1924).

As stated in Mr. Hibbard's book,⁴³ the Timber Culture Acts were a failure and were repealed. As a rider on the repeal, § 24 of 26 Stat. 1095 (1891) was enacted; this rider authorized the President to set apart public land bearing forests:

"That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation declare the establishment of such reservations and the limits thereof."⁴⁴

On its face it is patent that this law did not specifically reserve water on these lands. This word "water" is never mentioned in this portion of the enactment.

Yet, Congress obviously was aware of Western water problems. Water, canals, ditches, reservoirs, reclamation, and irrigation are discussed in this law in seven different places.⁴⁵ It is also interesting to note that Congress did make specific reservations in this law. Congress reserved coal, precious metals, townsites or land occupied by the United States for a public purpose, fish culture station sites, the Pribylov Group or Seal Islands of Alaska, the right to regulate the taking of salmon, the Annette Islands, gold, silver, cinnabar, copper, lead—everything but water.

Congress was cognizant in this law of both Western water and its right to reserve everything imaginable. Everything but water. The result in *Arizona v. California* notwithstanding, when Congress passed the basic law under

⁴³ *Id.*

⁴⁴ 26 Stat. 1095, 1103 (1891).

⁴⁵ 26 Stat. 1095, 1097, 1101, 1102 (1891).

which national forests were to be set aside by the President, it did not reserve water on those lands. In fact it did just the opposite. The following quotation is from § 18 of the law in question:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the pulic lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, *and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*"⁴⁶

B. Now let us return to the Master's Report. In extending the Winters Doctrine rights to other Federal Reservations, the Master said:

⁴⁶ *Id.* at 1101-02 (Emphasis added).

"Although the authorities discussed above which establish the reservation theory all involved Indian Reservations, the principles seem equally applicable to lands used by the United States for its other purposes Certainly none of the parties has suggested a tenable distinction between the two situations."⁴⁷

The fact that none of the parties suggested tenable distinctions between Winters Doctrine rights and reserved rights does not mean such distinctions do not exist. They do! Phrased in the simplest of terms, Indians are people. Ducks, and deer, and trees are not people. The entire sense of the *Winters* case is that all "conflicting implications" and "ambiguities" are to "be resolved from the standpoint of the Indians."⁴⁸ Phrased another way, Indians are entitled to special protection:

"Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art."⁴⁹

Wyoming believes the *Winters* case was a good result given proper answers to the unresolved questions that the

⁴⁷ *Arizona v. California*, 373 U.S. 546 (1963), Master's Report, pp. 292-93.

⁴⁸ *Winters v. United States*, 207 U.S. 564, 576 (1908).

⁴⁹ *United States v. Conrad Inv. Co.*, 156 F. 123, 128 (C.C.D. Mont. 1907).

case poses.⁵⁰ Wyoming believes, however, that the result can only be justified if it is grounded on fair and humane treatment for a minority group of people.

By what legerdemain can a tree or a duck be accorded the same treatment? The unvarnished fact is that as the reservation doctrine stands after *Arizona v. California*, the U.S. Department of Agriculture can, if it chooses, take anyone's drinking water supply to raise trees. That the U.S. Department of Agriculture would do so without compunction seems clear from *Glenn v. United States*, Civil No. C-153-61 (D. Utah, Mar. 16, 1963). The paradox is that the *Winters* case was decided to protect a minority group, Indians, from later arrivals; i.e., the homesteaders. That same case, through the conduit of *Arizona v. California*, is now the basis of allowing another late arriving majority, the Federal Government, to take water away from a different minority, the grantees of the homesteaders who lost the *Winters* case.

C. "Thus America became an asylum for the oppressed of Europe. The autocratic governments of northern

⁵⁰ As with most judicial legislation, *Winters* created more questions than it answered. How much water? For how long? For what uses? Are the rights transferable? As between Indians, who has the better right? As between reservations, who has the better right? Are all uses of equal standing? irrigation? stock watering? garden irrigation, household use? For how many years can Indian rights be valid with non-use? Granted that laches does not run against the Federal Government, vis-a-vis Western water rights, does laches run against the wards of the Federal Government?

It is presently Wyoming's position that *Winters* Doctrine rights embrace irrigation, stock and domestic uses on the reservation. Although the law passed by this Court does not so provide those rights should be defined so as to preclude wasteful use of the water. For the benefit of the Indians and other appropriators, those rights should be quantified.

Europe looked with indifference upon the rapid migration of their surplus population and capital to America; England actually encouraged it. But this rapid influx of population and capital changed the whole economic structure of this country. A plentiful labor supply in the East made it possible for the moneyed class to think of the West as a vast home market for manufactured goods. The pressure of immigration hastened the settlement of the remaining vacant lands of America. Moreover, it lent encouragement to those forces who looked beyond American boundaries, ever anxious to add broad acres to the public domain."⁵¹

"From 1866 to 1920 the United States surrendered most of its power and discretion over non-navigable waters to the states. Imbued with a concept of unlimited public land resources and pursuant to a national policy of encouraging western migration and economic development, Congress passed the mineral and water resources of the public lands to the settler, without charge or limitation of any kind, and left to the states and local mining districts almost complete freedom of control over their development and use."⁵²

In addition there was an almost urgent need felt by many people to settle the vast expanse of the land west of the 98th Meridian as a means of securing the territory against the English on the North, the Mexicans on the South, and the Russians to the West. Toward these ends, the Federal Government supplied people, via the homestead and mining laws, transportation and marketing

⁵¹ R. ROBBINS, *OUR LANDED HERITAGE* 127 (1942).

⁵² Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 632 (1957).

facilities by public land grants to the railroads, and finally water. That water would be and is necessary for Western economic development has been recognized early⁵³ and late.⁵⁴ The question automatically arises, why did not the Federal Government turn control of land over to the states as it did water? The answer seems to lie in the differences in the properties of the two resources and the financial problems of the Federal Government. The public land laws were self-enacting and needed little supervision, and supervision was something the Federal Government could not provide.⁵⁵ Water, on the other hand, is easily transportable and evanescent; its proper control needs administration which the Federal Government could not provide.⁵⁶ Water being essential to the arid states, and ade-

⁵³ "[John Wesley Powell] was convinced that outside the five southern public land states, and possibly the coastal states, the government had nothing left that was suitable for ordinary humid or semi-humid farming but scattered tracts and that new policies should be adopted for the arid lands beyond the 100th meridian, if they were to be made productive." PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 420 (1968), referring to Powell's REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES.

⁵⁴ *Trelease, Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUPREME COURT REV. 158, 184-88.

⁵⁵ As a result, many valuable Western mineral lands passed into private ownership, notwithstanding, statutory provisions in public land laws designed to prevent the loss of mineral lands by the Federal Government.

⁵⁶ Indeed even today the Federal Government does not have the organization, personnel, or appropriated funds to administer water in the Western United States.

quate administration being necessary to its use, state laws were developed early to distribute water.⁵⁷

The stage was set—land, transportation, and water. All that was needed was people, and they came by the thousands. Because Congress failed to allow large enough homesteads, as suggested by Powell,⁵⁸ many failed. The more persistent pioneers bought out the unsuccessful, developed the water, and succeeded, secure in the belief that they had patents from the Federal Government to the land, and certificates of appropriation from the state for water. They had every right to harbor those beliefs; why shouldn't they? Those opinions were consistent with Congressional policy beginning in 1866,⁵⁹ as far as can be discerned from any source, including the Brief for the United States in this case; that is still the policy of Congress. And well it should be.

It seems fair to attribute to Congress high enough standards to assume that the Congress would not have enticed people onto the arid Western lands and then rendered their labors and investments worthless by taking away their water. One is forced to ask, what next? May we not assume with equal force that when the national forests were set aside that Congress intended to reserve rights-of-way? Granted Congress did not say so, but then where did

⁵⁷ Wyoming had a Territorial Engineer in charge of water administration in 1888, two years before statehood. The earliest adjudicated Wyoming water right predated statehood by 28 years. That right is for 4 c.f.s. from the Bear River with a priority of May 1, 1862.

⁵⁸ Powell recommended entries of 2,560 acres. PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 420 (1968), referring to Powell's REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES.

⁵⁹ Act of July 26, 1866, 14 Stat. 253.

they express any intent to reserve water? Is not a national forest meaningless without access?

The sad and unhappy fact is that the Federal Bureau-cracy has joined hands with this Court to form an embryonic first cousin to the navigational servitude. That is a tragedy. One navigational servitude is too many in our system of government. A second, the reservation doctrine, is not only tragic but even worse, unnecessary. It is no surprise, however, that the U.S. Department of Agriculture is capable of creating such a doctrine; Parkinson⁶⁰ has adequately explained that phenomenon.

Finally, the Court should note that the Brief for the United States relies on *Arizona v. California* and the *Winters* case in support of the reservation doctrine.⁶¹ Why has the *Pelton Dam* decision been left out?—it is frequently mentioned to support reserved rights. The answer seems abundantly clear. *Pelton Dam*, as the facts were cast by the F.P.C. license, did not permit any consumptive use of water, and required recognition of all perfected and unperfected rights.⁶² That is not the kind of water rights the United States seeks. That it fully expects to harm private appropriators is patent. It seeks to perfect an 1892 water right in 1970.⁶³ Someone will be harmed, no one will be compensated.

⁶⁰ C. PARKINSON, *PARKINSON'S LAWS AND OTHER STUDIES IN ADMINISTRATION* (1957).

⁶¹ Brief for the United States at 9.

⁶² *F.P.C. v. Oregon*, 349 U.S. 435, 440 (1955).

⁶³ The principal, and probably only, reserved lands in the Eagle River drainage are those within the White River National Forest. The White River National Forest was set aside on June 23, 1892, by Presidential Proclamation No. 29 signed by President Benjamin Harrison. The word "water" is not used in that proclamation.

IV

CONSTITUTIONAL QUESTIONS

The United States apparently does not and could not argue that the destruction of the agricultural value of land is a taking which requires compensation under the Fifth Amendment.⁶⁴ If a private party is entitled to compensation because flooding has destroyed all or part of the value of his land, by analogy he is just as entitled to compensation if the agricultural value of his land is destroyed by depriving the land of water.⁶⁵

It is equally clear that the intent of the United States is to take reserved rights waters "for public use."

"Most of these withdrawals from the public domain have been made for the express purpose of conserving important segments of that area for the future use and enjoyment of the entire public of the United States."⁶⁶

It is perhaps necessary to lay to rest any question of the physical effect of an exercise of the reserved rights doctrine on a fully appropriated stream. In the arid West the

⁶⁴ *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). The ratio decidendi of the case is that the harm caused by the flooding, i.e., "the destruction of the agricultural value," not the flooding per se, is the basis for finding compensable damages. Certainly no damages would have been awarded if the flooding or raising of the water table had been beneficial. The destruction of agricultural value of the land justified the result, and not the manner in which the decrease in value occurred.

⁶⁵ *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950).

⁶⁶ Brief for the United States at 8.

totally appropriated stream is the rule, not the exception. It is obvious that if a new appropriator takes water out of a fully appropriated stream, he will, as a mathematical certainty, deprive a downstream appropriator of water. This deprivation can be identified as to quantity and time. The specific individuals harmed can likewise be identified. In sum, all of the elements of an unconstitutional taking under the Fifth Amendment to the United States Constitution are present in the exercise of a reserved right if the United States did not have a valid water right as of the date of the reservation.

As we understand the position of the United States, the exercise of the reserved rights doctrine is not violative of the Fifth Amendment because the reserved rights have existed since the reservations in question were set aside. This position, if sustained, casts a cloud on \$15 billion to \$20 billion in property rights. That being so:

"To convert [the *Winters* case] . . . from a [case to protect essential water rights of a small minority] . . . to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose."⁶⁷

In *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252-53 (1954), the F.P.C. was proceeding under the color of authority of a statute: the Federal Water Power Act of 1920. If this Court felt the F.P.C. needed to show a "convincing explanation of . . . purpose" to abrogate a New York State water right, why should the Western appropriation states be entitled to less? Where is the convincing explanation of Congressional purpose to support either the reserved rights doctrine or the United States view that the McCarran Amendment does not apply to

⁶⁷ *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252-53 (1954).

reserved rights? It is for the United States to make a showing of a "convincing explanation of . . . purpose" to sustain abrogation of many valuable water rights in the Eagle River or elsewhere in the West. Not only is such "purpose" nonexistent, there is strong evidence to show that the contrary is true, as demonstrated by past conduct of the principal proponent of the reserved rights doctrine, the U.S. Department of Agriculture.

Since 1960 the United States Forest Service has filed 45 applications for permits to appropriate water in Wyoming pursuant to Wyoming State Law. Each of these 45 applications has been filed for a direct flow right for use within an existing national forest, and in each instance the Forest Service was the sole applicant. These figures do not consider any instances where the Forest Service was a co-applicant. The breakdown by years is: 5 in 1965, 15 in 1964, 8 in 1963, 11 in 1962, 4 in 1961, and 2 in 1960. The obvious question is, if the reservation doctrine has been valid since the national forests were first set aside during the last decade of the Nineteenth Century and the first decade of the Twentieth Century, what on earth is the Forest Service doing perfecting rights under state law 60 or 70 years later? Phrased another way, how can anyone expect individual appropriators who invested their money to perfect water rights, under the appropriation theory of Western Water Law, to be aware of the reserved rights cloud on their title if the owners of those reserved rights were unaware of the existence of said rights? The obvious answer is, you cannot. In order for the Forest Service to avoid the unconstitutional taking prohibition of the Fifth Amendment, it *must* show that all later appropriators knew or should have known that the rights they perfected were subject to the Government's prior reserved rights. How can the United States make such a showing when all

the facts sustain the conclusion that the Forest Service did not know that such rights existed?

We are aware that the Forest Service now makes the argument that their perfection of water rights under state law was simply a means of informing the states of their reserved rights. That fiction must have become "policy" with tongue in cheek. Wyoming has recently received the second annual computer print-out of claimed Forest Service reserved water rights in Wyoming.⁶⁸ That print-out lists 1,796 water rights. Of those 1,796 reserved rights, the Forest Service has filed applications for permits on 262. Query—why was it necessary to "notify" the State of appropriations for 262 reserved rights but not necessary to give such notification on 1,534 other rights?

Wyoming State Water Law provides that a water right be perfected by a procedure of filing an application to appropriate water, whereupon the State Engineer grants a permit to the appropriator to develop the water right. When the appropriation is completed, the State Board of Control "adjudicates" the right. This adjudication procedure is commenced upon request of the appropriator by the filing of a petition for adjudication. Of the 262 rights filed by the Forest Service, they have adjudicated, of their own volition, 191 rights. Query—if filing of a right was simply a means of notification, did that notification also require adjudication? If it did not, why did the Forest Service adjudicate any rights? If notification did require adjudication, why did not the Forest Service adjudicate all 262 rights?

The United States Forest Service, in the person of Arval L. Anderson, Acting Regional Forester in the Ogden, Utah, office of the Forest Service, filed a petition with the

⁶⁸ USDA, Forest Service, Denver, Colo., CURRENT AND FORESEEABLE WATER USES ON LAND RESERVED FROM THE PUBLIC DOMAIN (1970).

Wyoming State Board of Control requesting the Board's Order to correct erroneous land descriptions for adjudicated water rights, Permits Nos. 19,569 and 19,570.⁶⁹ All land descriptions involved in the correction are in Townships 30 and 31 North, and Range 115 West, of the 6th P.M. All of these locations are within the Bridger National Forest. The petition is dated December 7, 1953. The Bridger National Forest was reserved on October 17, 1916⁷⁰.

Query—if the Forest Service held a valid reserved water right in the Bridger National Forest with an October 17, 1916, priority date, why did the Regional Forester feel obliged in 1953 to petition the Wyoming State Board of Control for a corrected land description of a right over which the State of Wyoming has no control. Further, both the old and new land descriptions are within the national forest, therefore, under the reserved rights doctrine the Forest Service owned water rights in both locations. Why did it have to go through the expensive formal procedure of petitioning the State of Wyoming for a change; a letter would have served.

⁶⁹ Specifically the petition requested that Permit No. 19,569 point of use be changed from "NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 2, T. 30 N., R. 115 W.," to "point of diversion is S. 32° 12' E. 1811.3 feet from the SW corner of Section 35, T. 31 N., R. 115 W., and in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 2, T. 30 N., R. 115 W., and the water is used in Lot 4, Section 2, T. 30 N., R. 115 W." The point of use in Permit No. 19,570 was changed from "NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 2, T. 30 N., R. 115 W.," to "point of diversion is S. 6° 45' E. 1481 feet from the SW corner of Section 35, T. 31 N., R. 115 W., and in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, T. 30 N., R. 115 W., and the water is used in Lot 1, Section 3, T. 30 N., R. 115 W." Petition of the U.S. Dept. of Agriculture, Forest Service, to the Wyoming State Board of Control, dated November 30, 1953.

⁷⁰ Executive Order 2473.

Mr. Allen S. Peck, Regional Forester in Denver, Colorado, filed a petition with the Wyoming State Board of Control, requesting an Order of the Board changing the location of a headgate⁷¹ in Section 4, Township 48 West, Range 106 West. That land is within the Shoshone National Forest. Section 4, Township 48 West, Range 106 West, is within land reserved March 30, 1891. The petition is dated February 18, 1941. As with the petition discussed in the preceding paragraph, why did not the Regional Forester write Wyoming a letter and "inform" the State Board of Control of the change? These examples are by no means exhaustive.

The point we make is that the Forest Service argument that they perfected water rights prior to October 1965 only as a means of notification of the states of their reserved rights is utter fiction! Their own actions prove the point. No one, including the Forest Service, gave any credence to the reserved right doctrine other than Winters doctrine rights until the *Pelton Dam* decision; that was in 1955. No one, including the Forest Service, gave credence to reserved rights other than Winters Doctrine rights, where the right permitted an impairment of privately held water rights until *Arizona v. California*; that was in 1963.

If the primary advocate of reserved rights, the Forest Service, did not realize the existence of these rights until 1963, how could a private party know or acknowledge their existence before 1963? It cannot reasonably be argued that, except for Winters Doctrine rights, a private party knew or should have known of the Forest Service's reserved rights before 1963 for the simple reason that no one, the Forest

⁷¹ The change was "from a point N. 72° 08' E, 1761.6 ft. from SW corner of Section 4, T. 48N., R. 106W., to a point S. 74° 5' E, 3041 ft. from the corner above described." Petition of the U.S. Dept. of Agriculture, Forest Service, to the Wyoming State Board of Control, dated February 18, 1941.

Service included, knew that a viable reserved rights doctrine existed until this Court's decision in *Arizona v. California*. It therefore follows that any reserved right with a priority date earlier than 1963 that deprives any prior appropriator of water, is a violation of the Fifth Amendment.⁷²

CONCLUSION

The State of Wyoming does not harbor the anachronistic opinion that all of its waters should forever be used for irrigation. That view would ultimately result in a petrified economy. Quite the contrary, Wyoming water law has a built-in provision to permit the migration of water uses to higher or preferred uses, and all parties private and public are given the right to condemn water rights for application to higher uses.⁷³

This system is admirably adapted to accommodate the migration of this limited resource to its highest and best use, including the needs of the Forest Service. If the Federal Government wishes to convert an irrigation use to a recreation use, it may do so by condemning an irrigation right. One of the advantages of this approach is that Congress must appropriate funds to finance the condemnation, and the conversion of the resource will thereby be given Congressional scrutiny. For years Wyoming has used this

⁷² *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *United States v. Causby*, 328 U.S. 256 (1946).

⁷³ § 41-3, Wyo. Stat. (1957).

very system effectively. If a town, city, industry or other user needs water, he goes into the open market and purchases the right. If there are no sellers, he may condemn a suitable right provided the proposed use is a higher use than the present use. The older the priority date he purchases, the more valuable the right. This controls the price, but because the purchaser of the preferred right may condemn, he selects the least expensive right which is commensurate with his needs. This is another way of saying he selects the most junior priority he can find which hydrological studies show will give him the reliability necessary for his intended use.

It is this system which Wyoming believes must be applied to all appropriators. It does not really matter whether the system is administered by the State or Federal Government. What really does matter is whether or not all appropriators are subject to the system. If any substantial number of water uses or rights are not subject to the system, the entire system will not operate.

What is the logic of having all of the people contribute land to the national forests, and all of the people contribute taxes to purchase rights-of-way, and all of the people contribute taxes to support the Forest Service to manage the forests, and then pick out one person or a very limited group of people and force upon them the burden of contributing water? We would think it wrong to pick out a single manufacturer of pickup trucks and make him donate pickups to all the Forest Rangers so they can better manage the national forests to make them more useful and productive. How then can we justify making a few individuals supply water for the same ends?

The United States has tried to justify that result by the fiction of reserved rights. That policy has never been and is not now consonant with any philosophy ever expressed by the United States Congress. The best and fairest

result the Court can reach in this case is to abrogate the Court-created reserved rights doctrine. In the alternative, it should refuse to decide the case. Finally, if the Court does decide the case, it should make reserved rights subject to the McCarran Amendment. It can then define reserved rights, if Congress has not already done so, when this case is appealed after the Colorado courts adjudicate the Eagle River system.

Respectfully submitted,

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July 1970.

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No. ~~1178~~ 87

IN THE
Supreme Court of the United States
October Term, 1969

UNITED STATES
Petitioner

VERSUS

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE
AND STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO

AMICUS CURIAE BRIEF
FOR THE STATE OF OKLAHOMA

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June 15, 1970

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No. 1178

IN THE
Supreme Court of the United States

October Term, 1969

UNITED STATES

Petitioner

VERSUS

THE DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE
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**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO**

**AMICUS CURIAE BRIEF
FOR THE STATE OF OKLAHOMA**

INTEREST OF AMICUS CURIAE

The State of Oklahoma is essentially an appropriation state with respect to water adjudication. 82 O.S. Supp. 1969, § I-A. In determining water rights within its borders the State is faced with the problem that the United States asserts certain water rights based upon the doctrine of reserved rights. Such being the case, all deter-

minations of water rights made concerning river systems in which the United States claims reserved rights, are subject to such reserved rights. This leads to confusion and uncertainty as concerns the water rights in such river systems. Therefore, it is believed that there should be some method through which the state can force the United States into some forum in order to determine the extent of the rights the United States has in such river system. The State of Oklahoma therefore has an interest in the question of whether or not 43 U.S.C. § 666 consents to suit against the United States in situations where the United States claims water rights under the doctrine of reserved rights.

ARGUMENT

I.

BY VIRTUE OF TITLE 43 U.S.C. § 666 THE UNITED STATES HAS CONSENTED TO SUITS AGAINST IT IN CASES WHERE THE UNITED STATES CLAIMS WATER RIGHTS UNDER THE DOCTRINE OF RESERVED RIGHTS.

The United States has considerable claims to the nation's water resources. Many of these claims are based upon the doctrine of "reserved rights", which is to the effect that the United States is entitled to use as much water from sources of land withdrawn from the public domain as is necessary to fulfill the purposes

for which the lands were withdrawn, subject only to water rights vested as of the date of withdrawal. *Arizona v. California*, 298 U.S. 558, 56 S.Ct. 848, 80 L.Ed. 1331 (1936).

Furthermore, the State of Oklahoma has a great interest in the administration and determination of water rights within its borders, as do the other Western States. In areas where the United States asserts some "reserved rights", any rights determined by the State will always be indefinite because they will be subject to the "reserved rights" in the United States. In this regard the Colorado Supreme Court stated:

"We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree of permit and which therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure — and this is equally true from the standpoint of the United States as well as Colorado and its citizenery." *United States v. District Court In and For Co. of Eagle*, 458 P. 2d 760, 772 (1969).

Therefore, in such situations there is a definite need for the state to be able to force the United States into some forum for the purpose of determining exactly what rights the United States has in the waters in question. Title 43 U.S.C. § 666, *supra*, can be construed as authorizing suit against the United States in such situations.

This section, commonly referred to as the McCarran Amendment, provides in part as follows:

“(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: PROVIDED, That no judgment for costs shall be entered against the United States in any such suit.

“(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.”

It is submitted that the use of the term “or otherwise” in the above statute extends its application to situations wherein the United States claims water rights based upon the doctrine of “reserved rights”. Such a construction can be supported by certain aspects of the legislative history of the Act.

Prior to the passage of the Act the Acting Assistant

Secretary of the Interior wrote a letter to Senator McCarran. In that letter he expressed opposition to the bill, and recommended that it be changed in order to make it clear that the Act gave no consent for adjudication of rights other than those acquired under State law. The changes were not made and the bill passed as it stood at the time of the letter. See Comment, Adjudication of Water Rights Claimed by the United States — Application of Common-Law Remedies and the McCarran Amendment of 1952, 48 Calif. L. Rev. 94, 112 (1960); and the opinion of the Colorado Supreme Court below, 458 P. 2d 760, at 773. Such would warrant a finding that the intent behind the Act was to consent to suits against the United States in situations where the United States claims water rights under the doctrine of "reserved rights."

It is true that the doctrine of *ejusdem generis* could be applied for the purpose of arriving at a different result. However, it is submitted that the doctrine may not be used to defeat the obvious purpose of legislation. *Gooch v. United States*, 297 U.S. 124, 56 S.Ct. 395, 80 L.Ed. 2d 522 (1936).

Therefore, it is submitted that the Supreme Court of the State of Colorado did not err when it held, at 458 P. 2d 760, 773, as follows:

"For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment

that it be used to obtain jurisdiction over the United States with respect to its reserved water rights.”

CONCLUSION

The State of Oklahoma respectfully submits that the holding of the Supreme Court of the State of Colorado, to the effect that 43 U.S.C. § 666 consent to suit against the United States with respect to its reserved water rights, be affirmed.

Respectfully submitted,

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SUPREME COURT

UNITED STATES

October Term, 1907

No. 1

UNITED STATES

Petitioner

**THE DISTRICT COURT IN AND FOR
COUNTY OF EAGLE
AND STATE OF COLORADO**

Respondent

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO**

**AMICUS CURIAE BRIEF
FOR THE STATE OF WASHINGTON**

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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1969

No. 1178

UNITED STATES
Petitioner

v.

THE DISTRICT COURT IN AND FOR THE
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IN THE
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**AMICUS CURIAE BRIEF
FOR THE STATE OF WASHINGTON**

The State of Washington, by and through its Attorney General, files this Amicus Curiae brief under Rule 42(4) of this Court.

STATEMENT OF INTEREST

Most, if not all, of the states of the western United States have procedures for the "general adjudication" of water rights. The State of Washington included its variation thereof in the "Water Code of 1917." See RCW 90.03.110-RCW 90.03.240. During the 1920's and early 1930's an active state adjudication program was carried out. For various reasons this program became almost totally dor-

mant from the mid-1930's to the mid-1960's. In 1964 the State of Washington, through its Department of Conservation, reactivated an adjudication program. Three years later the State legislature placed greater emphasis on this program by creating a separate division of "adjudications" within the Department of Water Resources (the successor agency to the Department of Conservation) and appropriating a sizeable amount of money to fund its water rights adjudication activities. See RCW 43.27A.070. This program, which has since been transferred by Chapter 62, Laws of 1970 to the Department of Ecology, has been further expanded as each year has passed. The rulings on the issues raised in this case will have a direct impact on the progress which the State of Washington will make in its recently activated water rights adjudication program.

Since 1964 the State of Washington, relying on 43 U.S.C. 666, has joined the United States as a defendant in every water rights adjudication initiated in a superior court of the State of Washington in which the United States has been the owner of real property within the drainage of the stream system being adjudicated or has appeared to be a claimant of a right to divert from the stream system. Whenever the United States has been joined, it has fully participated in the same manner as every other claimant. In so doing it has presented its proof, including proof of "reserved rights," and,

from time to time, contested the claims of others. And in the one case during this period in which such a court has confirmed a water right to the United States in a final decree of adjudication, the United States has chosen not to appeal that decree. *In re Chiliwist Creek*, Okanogan County Cause No. 16323, (1967).

The State of Washington submits this brief because of concern that its adjudication program, which now for the first time incorporates a general adjudication providing for a truly full and complete determination of *all* claims on a stream system, may be disrupted if not completely upset by a possible "adverse" decision.

ARGUMENT

I. *The Issues:*

This brief will be limited to the discussion of two issues, namely:

A. Has the United States, by 43 U.S.C. 666, consented to be joined in a water rights adjudication of a *stream system which is tributary* to another stream?

B. Does the consent by the United States under 43 U.S.C. 666 to be joined in a water rights adjudication proceeding contemplate the adjudication of "reserved" water rights claimed by the United States?

II. *Position of Amicus Curiae*

A. Adjudication of "Tributary" Systems:

43 U.S.C. 666(a) provides for the joinder of the United States in an adjudication "of a river system or other source." In *State of California v. Rank*, 293 F.2d 340 (C.A. 9th 1961), the court wrote with regard to 43 U.S.C. 666 at page 347:

"There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication of a stream system; one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated'."

When Congress referred to the "adjudication . . . of a river system" it was referring to the "general adjudications" of streams that have been historically carried out in the western United States. An examination of such cases will reveal that not only "tributaries" but "tributaries to tributaries" were the types of "river system or other source" that were adjudicated generally throughout the west prior to the enactment of 43 U.S.C. 666.

Examples of general adjudications of such water sources in the State of Washington prior to 1952 include:

¹This court wrote approvingly of the Ninth Circuit's position in *Dugan v. Rank*, 372 U.S. 609, 618, 82 S.Ct. 1000, 10 L. Ed. 16 (1963).

In re Beaver Creek, Cause No. 3935, Okanogan County (tributary to Methow River—tributary to Columbia River).

In re Bull Dog Creek, Cause No. 8576, Stevens County (tributary to Colville River—tributary to Columbia River).

In re Cheweka Creek, Cause No. 7545, Stevens County (tributary to Columbia River).

In re Cooke Creek, Cause No. 6222, Kittitas County (tributary to Yakima River—tributary to Columbia River).

In re Deadman Creek, Cause No. 2558, Garfield County (tributary to Snake River—tributary to Columbia River).

In re Doan Creek, 125 Wash. 14 (1923), (tributary to the Walla Walla River—tributary to the Columbia River).

In re Gold Creek, Cause No. 7076, Okanogan County (tributary to Methow River—tributary to Columbia River).

In re Johnson Creek, Cause No. 6126, Okanogan County (tributary to Okanogan River—tributary to Columbia River).

In re Sherwood Creek, Cause No. 9523, Stevens County (tributary to Colville River—tributary to Columbia River).

In re Stemilt Creek, Cause No. 18107, Chelan County (tributary to Columbia River).

Subsequent to the enactment of 43 U.S.C. 666, and beginning in 1964, the State of Washington has initiated 12 adjudications, all but one of which concern "tributaries" or "tributaries to tributaries." The United States has been joined as a party defendant in 9 of these. In only one case has the United States based a challenge to the court's

jurisdiction on the "tributary" issue.² In all others the United States has not contested the state courts' jurisdiction. Cases where the United States has joined as a defendant include:

In re Black Lake-Tarlett Slough, Cause No. 16320. Pacific County (discharges to Willapa Harbor).

In re Blockhouse Creek, Cause No. 10076, Klickitat County (tributary to the Little Klickitat River—tributary to the Klickitat River—tributary to the Columbia River).

In re Bonaparte Creek, Cause No. 17787, Okanogan County (tributary to Okanogan River—tributary to the Columbia River).

In re Chiliwist Creek, Cause No. 16323, Okanogan County (tributary to Okanogan River—tributary to Columbia River).

In re Harvey Creek, Cause No. 17651, Stevens County (tributary to Columbia River).

In re Magee Creek, Cause No. 17812, Stevens County (tributary to Columbia River).

In re Mill Creek, Cause No. 10077, Klickitat County (tributary to the Little Klickitat River—tributary to the Klickitat River—tributary to the Columbia River).

²In that case, *In re Chiliwist Creek*, Okanogan County Cause No. 16323, the Washington State Superior Court denied a motion of the United States to dismiss on the grounds that Chiliwist Creek was not a "river system or other source" within the meaning of 43 U.S.C. 666. The "Memorandum Decision" of the Court is set forth in Appendix A herein. See also *In re Chiliwist Creek*, Civil No. 2491 (E.D. Wash. May 29, 1964.)

The United States thereafter proceeded as any other defendant-claimant. ((*In re Chiliwist Creek* was later appealed to the Washington State Supreme Court. The Court's opinion is reported in 77 W.D.2d 666, 466 P.2d 513 (1970). Neither the United States nor 43 U.S.C. 666 were involved in that appeal however.))

In re Mountain Lake—Cascade Creek, Cause No. 2448, San Juan County (discharges into Puget Sound).

In re Narcisse Creek, Cause No. 17563, Stevens County (tributary to the Little Pend Oreille River—tributary to the Colville River—tributary to the Columbia River).

The position of the United States that 43 U.S.C. 666 only applies to an entire drainage or watershed, such as the Colorado River (or the Columbia River), is at direct odds with the historic subject matter of western water rights adjudications. It likewise conflicts with the obvious intent of Congress to develop in the states an ability to carry out a *complete* adjudication whereby *all* claimants might participate and establish rights one as against another on a comprehensive interrelated basis. This court may take judicial notice that the Columbia River drainage includes portions of seven states as well as Canada. If state court adjudication proceedings can only operate, so far as 43 U.S.C. 666 is concerned, on large multistate (and international) drainages then for practical purposes 43 U.S.C. 666 can very seldom be utilized in states in similar positions as the state of Washington. Obviously, Congress did not intend to enact such an ineffective statute.

B. Adjudication of "Reserved" Rights of the United States.

Since 1964 the State of Washington has consistently taken the position that the "reserved"

water rights of the United States may be determined in state courts under its adjudications procedures. Indeed, the courts of the State of Washington have so determined the extent of reserved rights claimed by the United States or are presently in the process of determining claims for water rights based on the reserved rights doctrine in three cases.³

Amicus Curiae will limit its argument on the reservation issue to only one point.

The United States states in its petition for a writ of certiorari in this case that if 43 U.S.C. 666 extends to reserved water rights "the way is open for . . . the courts of other western states to attempt to 'adjudicate' those rights out of exist-

³In the final decree in *In re Chiliwist Creek*, the Okanogan County Superior Court confirmed reserved water rights claimed by the United States as follows:

"As to the so-called 'reserved rights', the referee finds the claimant, based on the scope of the forest reservation as set forth in the Proclamations of the President of the United States establishing the Okanogan National Forest, and taking into account the quality of the soils, the natural flora and fauna and the topography of the lands in question, the climatic conditions, and past and present uses of the lands, is entitled with a priority date of 1897 to make use of the waters of Chiliwist Creek now and in the future in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest reserve lands were reserved; namely, timber management and production and related purposes including fish and wildlife management, livestock grazing, and recreational activities."

Decree of Judge Robert J. Murray, dated May 16, 1967. See the comment on the case in 1 *Wheatley and Corker, Study of the Development, Management and Use of Water Resources on the Public Lands*, 137 (1969). See also comment, 20 *Stan.L.Rev.* 1187 at 1192 (1968).

ence.”⁴ As previously stated, claims for reserved rights by the United States have been submitted in water rights adjudications cases to various superior courts in the State of Washington. In *In re Chiliwist Creek*, *supra*, a water right based on the reservation doctrine was granted. There is no reason to believe, based on recent experience, that the courts of this state will depart from the practice of fully and fairly considering the claims of the United States just as they do all other claims. The position of the United States that the Courts of the western states will “adjudicate” away valuable property rights of the United States appears to be a “straw man” and should be treated as such.

The State of Washington is certainly willing to admit its dissatisfaction with certain aspects of the reservation doctrine because of its potential for extinguishing the value of presently exercised state based water rights and for complicating future state water planning efforts. (Hopefully, through future congressional action, some of the potential inequities of the reserved rights doctrine will be eliminated.) This dissatisfaction should not, however, lead to a conclusion that states in their court adjudications of water rights will deny claims for water rights because they are based on locally unpopular doctrines. Recent judicial action in Washington State does not bear out the federal government’s apprehensions.

⁴See “Petition for a Writ of Certiorari of the United States” at page 16.

SUMMARY

The State of Washington's view is that the United States has consented to be sued by 43 U.S.C. 666 in state water rights adjudications which involve a "tributary system" to the main stem of a stream. It is further submitted that consent under 43 U.S.C. 666 includes within its scope the adjudication of "reserved" water rights of the United States in state courts.

Respectfully submitted,

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July 1970

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR
OKANOGAN COUNTY

In the Matter of the Determination of the Rights
to the Use of the Waters of Chiliwist Creek
and its Tributaries in Okanogan County, Wash-
ington, in Accordance With the Provisions of
Chapter 90.03 Revised Code of the State of
Washington.

M. G. Walker, as Supervisor of Water Resources for
the State of Washington,

Plaintiff,

vs.

Biles-Coleman Lumber Company, et al.

Defendants.

MEMORANDUM DECISION

No. 16323

The supervisor of water resources for the State of Washington initiated a proceeding pursuant to R.C.W. 90.03 to adjudicate the waters of Chiliwist Creek in Okanogan County. It would appear the United States may own land in the water shed and it is trustee for an Indian ward allottee having lands within the water shed, and is joined as a party. It appears that all of the persons who claim or might claim the right to the use of waters within this water shed have also been joined. In other words, this proceeding was initiated for the purpose of

completely adjudicating the waters of Chiliwist Creek.

The United States and T. B. Charley (the Indian ward) initiated a proceeding in Federal Court to remove the proceeding to the Federal District Court for trial and determination under the provisions of Sections 1446 and 1447 of Title 28, U.S.C. The State of Washington moved to remand back to State Court and thereafter the United States moved to dismiss the United States and T. B. Charley on the ground the Superior Court of Okanogan County had no jurisdiction and therefore the District Court had no jurisdiction, and that the proceeding was not a general adjudication of water rights so as to bring the proceeding within 43 U.S.C. 666. May 29, 1964, the District Court ruled that the United States had waived its right to immunity in 43 U.S.C. 666, and announced agreement with the decision in *In re Green River Drainage Area*, 147 Fed. Sup. 127 (1956). An Order of Remand was filed June 24, 1964. Said Order reserved a rule upon the motion to dismiss to the State Court.

It is to be noted that the opinion in Federal Court and the Order pursuant thereto holds that the State Court has jurisdiction of a water rights case under 43 U.S.C. 666. It seems to be somewhat of a question as to what this Court can now decide. The Federal Court's decision would seem to be that the facts of this case place it within the coverage of said Section 666, and if the Order of the Federal

Court so decided, then it must necessarily have decided also that this stream is a "river system or other source." This would mean that the motion here urged has already been passed upon and is adjudicated by the Order of the Federal Court. In any event, the question of what is or what is not a river system is well nigh impossible to answer. This writer has seen many streams called creeks larger than other streams called river and, of course, vice versa. In this case it appears that all persons who might have any claim to the waters of Chiliwist Creek were joined. Chiliwist Creek, during flood time at least, is a tributary of the Okanogan River, the Okanogan River during all times known to this writer has been a tributary of the Columbia River (but this now graying head has seen the time when an extra cow or two drinking from it would have prevented any portion thereof from reaching the Columbia River). The Columbia River, of course, flows into the Pacific Ocean. The Government contends that all waters within a "river system" must be adjudicated, which would mean in this case that all of the waters of the Columbia River, the Snake River, and the numerous other rivers extending throughout some of the provinces of Canada and several of the United States would have to be involved. It does not seem to this Court that Congress had this latter theory in mind when 666 was enacted.

The statute says, ". . . for the adjudication of rights to the use of water of a *river system* or

other source, . . . Webster's dictionary defines a "river" as a stream larger than a brook or a creek. This is a rather anomalous description; if the person who named this stream had first come upon it in flood time, perhaps it would now be called Chiliwist River. Webster's dictionary defines "source" as "the beginning of a stream of water or the like; a spring; a fountain." It would thus appear that the statute would authorize adjudication of a mere trickle so long as it constituted the beginning of a stream.

This Court is of the opinion that the Green River Case above mentioned correctly construed the intent of Congress in a realistic and practical fashion; and that any other construction would depart from the purpose Congress had in mind when this statute was enacted.

The motion of the United States and of T. B. Charley to be dismissed from the proceeding will be denied.

DATED THIS 26th day of February, 1965.

/s/ Robt. J. Murray
ROBT. J. MURRAY,
Judge.



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No. 1178

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

UNITED STATES, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

**BRIEF FOR THE STATE OF ARIZONA
AND THE ARIZONA INTERSTATE STREAM
COMMISSION AS AMICI CURIAE**

The State of Arizona, sponsored by its Attorney General, and the Arizona Interstate Stream Commission, an agency of the State of Arizona organized and existing under and by virtue of Title 45, Chapter 2, Article 2, Arizona Revised Statutes, sponsored by its authorized law officer, present this brief as amici curiae under Rule 42(4) of the Rules of this Court.

QUESTIONS PRESENTED¹

1. Whether Congress in enacting the McCarran Amendment (43 U.S.C. § 666) intended to allow the United States, in cases in which it asserts water claims under the reserved rights doctrine, to rely upon its sovereign immunity defense and thereby not only prevent any determination as to whether such claims by the United States are valid or invalid but also prevent any effective determination of any water rights along the water source at issue.

2. Whether the McCarran Amendment authorized suits against the United States to determine the water rights on identifiable streams or rivers which are tributaries of other rivers, or whether the waiver applies only to an adjudication of rights in a river which is not a tributary of any other river.

INTEREST OF THE STATE OF ARIZONA AND THE ARIZONA INTERSTATE STREAM COMMISSION

By statute, the Arizona Interstate Stream Commission is charged with prosecuting and defending "all rights, claims and privileges of the State [of Arizona] respecting interstate streams." ARS § 45-506 B 1. Many of the interstate streams in Arizona traverse lands withdrawn by the federal government. The issues posed by the instant case are of central importance to the proper discharge of the Arizona Interstate Stream Commission's statutory duty. As will be developed more fully in the body of the brief, it is impossible to determine either the rights of the State of Arizona, or the rights of any other claimant on a given stream or water source unless the rights of all claimants in that source are determined as part of the same adjudication. This problem exists irrespective of whether the federal claims are founded on state or federal law. Therefore, if the United States is allowed to rely upon

¹ In our view, the issue treated under Section II of the Government's brief is not properly before the Court because the Colorado Supreme Court has not finally ruled upon it. In any event, the issue involves solely matters arising out of the Colorado Constitution and Enabling Act, and will not be treated by this brief.

its sovereign immunity defense, the United States will not only prevent adjudication of the validity of its own water claims, but also all other claims to the same source, including those of the State of Arizona.

ARGUMENT

I.

The basic dilemma which the McCarran Amendment² was intended to resolve is well-known. In the usual case the water rights of any individual claimant cannot be determined in isolation from the rights of other claimants along the same stream or other water source. A judicial determination that any one individual is entitled to a water right in a given source is of small significance, even to the claimant, unless there has also been a determination concerning the validity of other claims to the same source, including relative priorities, and quantities to which each claimant is entitled. As the Ninth Circuit Court of Appeals has observed:

"The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time." *People of the State of California v. United States*, 235 F.2d 647, 663 (9th Cir. 1956).

Prior to the McCarran Amendment, claims by the United States to the waters of any stream or water source posed the following dilemma: (1) The rights of any claimant could not be effectively adjudicated without joining all claimants, including the United States, but (2) The United States, unlike individual claimants, could prevent its own joinder as a defendant because of its sovereign immunity.

Therefore, the mere existence of a United States water claim—not right, but claim—in a river system or other source effectively

² Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666, commonly referred to as the "McCarran Amendment," because it was enacted as a rider to the Appropriations Act for the Justice Department.

precluded not only the determination of the validity of that claim, but also the determination of all water rights in the entire river system.

The purpose of the McCarran Amendment was to eradicate this dilemma. At the time that the bill was pending before Congress, some fear was expressed that it might be used as a weapon to impede the development of United States reclamation projects. In a letter to Senator Magnuson, Senator McCarran stated the purpose of his amendment, and clarified that it was not to be used by individual litigants on a single-shot basis to impede reclamation projects. Senator McCarran wrote (98 Cong. Rec. 123 (1952)):

"You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used . . . for any other purpose than *to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.*" (Emphasis added.)

The Ninth Circuit Court of Appeals stated the purpose of the McCarran Amendment as follows:

"There can be little doubt as to the kind of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters on the stream system; rather, it was the quasi-public proceeding in which the law of western waters is known as a 'general adjudication' of the stream system: one in which the rights of all claimants on the stream system, as between themselves, are ascertained and officially stated." *State v. Rank*, 293 F.2d 340, 347 (9th Cir. 1961).

The debilitating limitation which the Government in the instant case is attempting to engraft on the McCarran Amendment is at odds with the statutory language, and would reinstate—in cases involving United States water claims under the reservation

theory—they very dilemma which Congress thought that it had eliminated when it passed the McCarran amendment. The sovereign immunity of the United States is just as much a bar not only to determination of claims of the United States, but also to effective determination of other water claims when the United States claims rest upon alleged reserved rights as when they are founded on any other basis.

It is true, as the Government states, that the reservation doctrine differs in some respects from the doctrine of appropriation. But it does not follow—as the Government appears to assume—that the mere fact that there has been a reservation of federal lands precludes the existence of any questions with regard to the quantities of water which were reserved for use in connection with the reserved lands or the priorities established thereby vis-a-vis other lands. Taking at face value the Government's statement concerning the extent to which rights are acquired under the reservation theory, it is readily apparent that adjudication of water rights on a river or other water source cannot be accomplished unless the reserved rights of the United States are also adjudicated. The Government states that:

"Reserved rights entitle the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of that date." Brief for the United States, p. 9.

Accepting this characterization as correct, it immediately appears that lack of jurisdiction over the United States in a general adjudication of a stream along which the United States claims water rights under the reservation theory would preclude the effective determination of relative rights in that stream. No such adjudication would be possible unless the following questions, for example, were resolved:

1. What was the date of withdrawal?
2. As of the date of withdrawal, what were the "existing vested water rights"?

3. What were "the purposes for which the lands were withdrawn"? Is the water being used for these purposes or for other purposes, which have come into existence since the date of withdrawal?

4. How much water is "necessary to fulfill the purposes for which the lands were withdrawn"?

5. What portion of the withdrawn lands is served by the water source at issue and what portion is served by some other source? What portion of the total water requirements for the reserved lands will the litigated water source have to bear?

The statement in the Government's brief that the Colorado Supreme Court decision in this case "effectively dispos[es] of valuable property rights of the United States" (Brief for the United States, p. 18) is flatly erroneous. The effect of the Colorado Supreme Court's decision is not to deprive the United States of legitimate water rights that it has, but simply to permit the determination of whether in fact, such water rights exist. The "disposing of valuable property rights" will occur not if the lower Court's decision is affirmed, but if the Government's position prevails on this appeal, because what the Government is really asking in this case is not protection from deprivation of its rights, but insulation from the possibility of a determination as to whether it has any rights.

Reversal of the lower Court on the grounds urged by the Government will effectively place the Government in a position where the mere assertion of a water right under the reservation theory will be tantamount to the existence of such a right, because of the Government's ability to hide behind the sovereign immunity shield.

In its Petition for Certiorari, the Government complained that "if allowed to stand, the decision below will expose the United States to hazards of litigation regarding its water rights" Petition for Certiorari, p. 12. The only "hazard of litigation" which the Colorado Supreme Court decision poses to the United States is that there will be a judicial determination whether claim-

ed water rights can or cannot be supported, and whether they are or are not prior to other claimed rights.

Whatever differences may exist between the reservation doctrine and the appropriation doctrine are not really material to this case. The point of central significance under each doctrine is the establishment of rights as of a given point in time. Taking the Government's definition, the time priority in the case of reserved rights is established as of the date of withdrawal. In order to have an effective adjudication, that withdrawal date, and the rights established thereby, must be fitted into the total hierarchy of water rights which it is the function of the courts to establish.

Another consistent theme running through the Government's argument is that state courts will be unfair to the United States in this kind of litigation. Aside from the fact that assuming a universal bias in state courts against federal water rights is not a proper basis for such an argument, the argument itself is inapt. Even assuming the existence of such a bias, the United States could never be deprived of its rightful water rights. So long as this Court sits there exists a tribunal which can correct any water rights judgment entered as a result of bias against the United States.

Congress could hardly have been more explicit in clarifying its intent to waive the sovereign immunity of the United States in all cases involving an adjudication of water rights or for the administration of water rights of a river system or other source. The waiver of immunity applies "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666. The scope of the waiver must be determined by analyzing the four prepositional phrases which follow, and modify, the pivotal term "water right." These four prepositional phrases describe the four types of water rights to which the waiver of immunity is intended to apply. The four categories are:

1. "by appropriation under State law,"
2. "by purchase,"
3. "by exchange,"
4. "or otherwise"

We submit that Congress, by adding the all-inclusive phrase "or otherwise" at the end of its list of types of federal claims to which the immunity waiver applies, intended to make its waiver effective as to all types of federal claims. This interpretation is also the only interpretation which is consistent with the underlying purpose of the entire section.

Upon analysis, the rule of *eiusdem generis* does not support the Government's position. The first three of the four prepositional phrases obviously refer to specific means whereby the United States may acquire water rights. The United States, just like any other appropriator, may appropriate according to state law. Similarly, the United States may purchase land, or engage in a land exchange, and thereby acquire water rights. The Government's *eiusdem generis* argument apparently rests on the proposition that the phrase "under State law" implicitly modifies not only "appropriation," but also "purchase," "exchange," and "or otherwise." In this the Government fails both on its grammar and also on its law. Grammatically, if Congress had intended to limit all four types of the described water rights to those which are governed by State law, it would have said so, by limiting § 666 to those cases "where it appears the United States is the owner of or is in the process of acquiring water rights *under State law* by appropriation, by purchase, by exchange or otherwise. . . ." Congress did not do so. Under § 666, as it was passed by Congress, the "under State law" limitation applies only to water rights acquired by appropriation.

Selected excerpts from the legislative history of Section 666 refer to rights obtained under State law; however, there is nothing in the legislative history which indicates that the statute dealt only with rights acquired under State law. Indeed there are por-

tions of the history which demonstrate that Congress was dealing with all situations in which the Government's immunity precluded a determination of water rights on a stream, such as the statement by Senator McCarran that the purpose of the Act was "to allow the United States to be joined in a suit wherein it is necessary to adjudicate *all of the rights* of the various owners on a given stream." 98 Cong. Rec. 123 (1952) (Emphasis added).

In a letter stating the views of the Interior Department on Senate Bill 18—whose provisions were in all material respects the same as those of the McCarran Amendment as finally enacted—Mr. Mastin G. White, acting Assistant Secretary, recommended that the bill not be enacted. Mr. White proposed that the waiver of immunity should be limited in several respects, among them:

"The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years) . . ." 98 Cong. Rec. 123 (1952)

Thus, the Interior Department viewed Senate Bill 18 as waiving the immunity of the United States in cases involving all types of federal claims, and specifically requested that the waiver be limited to "an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law. . . ." Congress did not accede to this governmental request to change the scope of the statute. Having failed to persuade Congress to change the statute, the Government is now attempting to have this Court change it.

The irony of the Government's position—and its incompatibility with the basic purpose of the McCarran Amendment—is illustrated by the Government's concession that in given cases the United States might "[list] and [seek] recognition, in adjudication proceedings to which it is otherwise properly a party, of its existing and estimated future requirements for water claimed

under the reserved rights doctrine in the area involved." Brief for the United States, p. 19. Thus, in some cases the Government is apparently willing to inform the courts concerning the amount of water that it needs, but not to have the courts determine whether it is entitled to such water. If the Government is so confident of its water rights under the reservation doctrine, why does it object so strenuously to a determination of the existence and extent of those rights?

With all due respect, it is not becoming to the sovereign to hide behind an ancient and outworn doctrine which makes it immune from suit, agreeing to do nothing more than inform courts adjudicating the water rights of its neighbors as to the amounts of water which it claims, without permitting those courts to determine the validity of such claims. It was precisely this type of misuse of sovereign immunity which led to the enactment of the McCarran Amendment. The Government should not now be permitted to repeal that Act insofar as it pertains to reserved rights.³

³ Interestingly enough, the Government's contention in the instant case is inconsistent even with the position which the Government itself has taken on prior occasions. In *Hurley v. Abbott*, 259 F.Supp. 669 (D. Ariz. 1966), the Government's Motion to Dismiss, signed and orally argued by one of the same counsel who appears for the Government in the instant case, urged five separate grounds for dismissal of the action, not one of which was that § 666 does not apply to reserved rights.

The facts alleged in the complaint in *Hurley v. Abbott*, of which this Court can take judicial notice, are illustrative of the chaos which could result if the Government is allowed to claim unlimited quantities of water under the reservation theory, and then preclude all opportunity for challenge to such claims. The principal sources of water for all of metropolitan Phoenix—presently consisting of more than one million people—are tributaries of the Salt River which flow through an Indian Reservation. If the Government's position in this case is correct, the Bureau of Indian Affairs and the Indian Tribe involved could elect to dot the reservation with industrial activities requiring excessive quantities of water, and could completely cut off the major portion of metropolitan Phoenix's water supply. The people of the Phoenix area would be powerless to do anything about it, except to recite night and morning that the King can do no wrong.

II.

The Government never really declares its position on the second of the two issues in the case: the definition of "a river system or other source." At several points the Government appears to suggest that it must not be joined in suits to determine water rights only along tributaries, and that all claimants to the Colorado River—and we would assume all of its tributaries—must be joined as a prerequisite to obtaining jurisdiction over the United States. At another point the suggestion is made that it would be sufficient if all water users of the Colorado and its tributaries within the State of Colorado were joined. Either of the Government's apparent interpretations would as a practical matter eliminate the possibility of any suit being brought under § 666, simply because the resulting litigation would be totally unmanageable.

In our view, the key to the resolution of the issue lies in interpreting the statutory language against the background of the overall purpose of the statute. The fundamental objective of the statute being to eliminate an otherwise insurmountable obstacle to the adjudication of water rights, the proper interpretation of the statute is that Congress has waived the immunity of the United States in *all* suits involving all claimants to the waters of any river system or other source. Under this interpretation, it is immaterial whether the river involved is or is not a tributary of another river. So long as *all* potential claimants along the river system or other source at issue are joined in the suit, the McCarran Amendment would apply.

The Government complains that it is obligated to defend water suits on other tributaries of the Colorado, and also suits in Utah, Idaho, New Mexico, and Washington. That is because the Government claims water rights on those other tributaries and also in Utah, Idaho, New Mexico, and Washington. But those who use water only along the Eagle River in Colorado are simply not affected by the claims of the users along other Colorado tributaries any more than they are affected by claims of users in Utah,

Idaho, New Mexico and Washington.⁴ It would be unfair to users along the Eagle to prevent them from securing adjudication of their water rights without joining the users along all other tributaries of the Colorado, where the claims along these separate tributaries are not in conflict with each other.

In our view, it is highly significant that the statute speaks in the disjunctive: "river system *or* other source. . . ." (Emphasis added.) Thus, the provisions of § 666 were to come into play in suits involving either a "river system" or an "other source." The significance of the statutory reference to both "river system" and also "other source" is illustrated by a situation in Arizona which is typical of the situation in other western states. The Verde River and Tonto Creek are both tributaries of the Salt River, which, in turn, is a tributary of the Gila River, which, in turn, is a tributary of the Colorado River in its lower reaches. The headwaters of Tonto Creek are some 80 miles from the headwaters of the Verde River and these two are separated at all points by two large mountain ranges. The confluence of Tonto Creek and the Salt River is some 50 miles East of the confluence of the Salt and Verde Rivers. Physically it would be impossible for a user on the Verde River to interfere with a user on Tonto Creek. Of course, if an adjudication involved the rights to the use of water from the Salt River below the confluence of the Verde, then the adjudication would be broadened; perhaps such an adjudication is what was anticipated by the words "river system." However, the rights of the appropriators or users on the Verde River obviously could be adjudicated without joining the users on the Tonto.⁵

⁴ Here again, the Government's position is elusive. Is the Government now contending that § 666 applies only to a water suit which would determine all water rights in all states in which the Government has a water claim?

⁵ There may be users located downstream from the point of confluence between the Verde and the Salt who assert claims to the waters of the Verde. If so, these users would also have to be joined in a suit to determine rights on the Verde. But users along the Tonto would not be affected.

We submit that where adjudication is sought to determine all rights in a common source of supply of water, it is necessary to join only those who claim rights in that common source of supply. By its extension not only to "river system" but also to "other source" the statute clearly reaches such an adjudication.

The only holding which is consistent with the statutory purpose and with good sense is a holding that if the suit is brought solely for the purpose of determining inter sese rights along a particular river and its tributaries, water claimants along other streams need not be joined, because they are not necessary parties to such a suit. A person who owns land along the Verde River and uses water of the Verde River is simply not affected by the claims of other persons along the Tonto, the Gila, or other tributaries or sub-tributaries of the Colorado, unless by coincidence the same person also happens to own other land on which he uses the waters of those rivers.

The dispositive point is that uses along the Verde and uses along the Tonto are independent, and failure to join Verde users does not prevent an effective inter sese determination of water rights in and to the Tonto. The Verde River, properly viewed, constitutes a "river system;" under any conceivable view it constitutes an "other source." The statute should be interpreted to permit an inter sese determination of the relative rights of claimants, including the United States, in and to that river system or other source. As the Ninth Circuit Court of Appeals stated in *State of Nevada v. United States*, 279 F.2d 699, 701 (9th Cir. 1960):

"The suit to which the section [666] refers is one to establish the relative rights of users of the waters of a stream or other common source: one to settle disputes between such water users with respect to their rights among themselves."

The Government's suggestion that statewide adjudication is required is inconsistent with the statute. The relevant statutory language is "river system or other source." There are really two possible interpretations which fit the statutory referent, "river

system or other source." The first is that for which the Government at one point appears to contend here: that a "river system" must include only rivers such as the Colorado, which are not themselves tributaries of some other river, together with all of the tributaries of such rivers. The second is that which we propose, that a "river system or other source" includes any river system, whether itself a tributary or sub-tributary of some other river or not, so long as all claimants to its waters are joined in a single suit.⁶ Again, the statement of Senator McCarran is helpful. The sponsor of Section 666 stated that its purpose was "to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of *various owners on a given stream*." 98 Cong. Rec. 123 (1952) (Emphasis added.) Not "owners on major rivers" nor "all owners within a given State," but "owners on a given stream."

At least in the case of the Colorado River, and we suspect in the case of most others, the interpretation proposed by the Government would render the statute useless, simply because it would be absolutely impossible to join all claimants of the Colorado and all of its tributaries in a single suit. Literally, even with the most modern possible methods, by the time all of the defendants were even identified, a lifetime would have passed, and the identifi-

⁶ Along this line, the Government contends that in order to invoke § 666 in this case all users of the waters of the Eagle—and not just those since the date of the last adjudication—must be joined. The court below has adequately provided for such joinder, if necessary.

cation process would have to be undertaken again.⁷ The statute says "a river system or other source" which would imply that Congress meant any river system or other source. Especially since the alternate interpretation leads to absurd results, it is respectfully submitted that this is what Congress meant.

⁷ The time, money, and effort required recently to prepare a suit to determine the rights along the Verde River in Arizona will illustrate. The Verde River, as noted above, is only a tributary of a tributary of a tributary of the Colorado. In preparation for a suit under Section 666 to determine all of the rights along the Verde River, an exhaustive title search was conducted to identify potential water claimants who would have to be joined as defendants. Most of the land acreage served by the Verde River belongs to the United States, so that the search for claimants was greatly simplified. Even under these circumstances, however, the title search took more than three years, and required 12,636 man hours. Corresponding plat work required an additional 15,182 man hours. As a result of this work, 12,953 claimants, in addition to the United States, were identified, at a total cost of \$308,053, not including legal fees.

The case was settled before the complaint was ever filed. We need not elaborate, however, on the complexity of a litigation involving 12,953 defendants (with the United States 12,954) each with separate pleading, and separate evidence. Such a suit would have been undertaken had it been necessary, and would have been prosecuted, notwithstanding the tremendous expense and time involved. But the "river system or other source" in that case was only one small river, a tributary of a tributary of a tributary of the Colorado, and most of the land through which the river runs belongs to the United States. The undisputable teaching of the preparation for that lawsuit is that it would be an absolute impossibility to join in a single litigation all of the potential claimants along the Colorado and all of its tributaries, or all potential claimants within the State of Colorado.

CONCLUSION

It is no secret that even before the McCarran Amendment was adopted, the Justice Department opposed it. 98 Cong. Rec. 122-123, (1952). That opposition continues to the present. Either of the contentions which the Government is urging would go a long way toward repeal of 43 U.S.C. § 666.

The entire doctrine of sovereign immunity is of dubious utility. We submit that the total interests of our nation will be better served when the doctrine is completely discarded as a relic of a less enlightened age (as in fact has already been accomplished by a number of states). In the meantime, the decisions of this Court provide precedents for confining sovereign immunity to the precise bounds marked out by Congress. This Court discussed what it characterized as a "chilly feeling against sovereign immunity" in *National City Bank of New York v. Republic of China*, 348 U.S. 356, 359, (1955) as follows:

[E]ven the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as "Public opinion as to the peculiar rights and preferences due to the sovereign has changed", *Davis v. Pringle*, 268 U.S. 315, 318, 45 S.Ct. 549, 550, 69 L.Ed. 974; "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past * * *," *White v. Mechanics' Securities Corp.*, 269 U.S. 283, 301, 46 S.Ct. 116, 118, 70 L.Ed. 275; "* * * the present climate of opinion * * * has brought governmental immunity from suit into disfavor * * *," *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391, 59 S.Ct. 516, 519, 83 L.Ed. 784.

The basic position taken by the Government in this case flies squarely in the face of contemporary accepted ideas concerning the relationship between government and the people who elect it. The theoretical underpinnings of our entire system are that

power lies ultimately in the people; that government is selected by and responsible to the people; and that the relationships between government and the people are determined by the courts.

The notion that water claims by the United States are immune from legal determination is squarely inconsistent with these cornerstones of our democratic system. The irony of sovereign immunity is aptly illustrated by the position which the Government has taken in this case. The Government is asking this Court to do what Mr. Mastin G. White, on behalf of the Government, unsuccessfully asked Congress to do: prevent any determination concerning the validity of Government claims under the reservation theory.

Whatever the scope of sovereign immunity generally, in water rights litigation involving an entire river system or other source, sovereign immunity has been waived by the Congress of the United States. What Congress has done should not now be undone by this Court.

Respectfully submitted,

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THE DISTRICT COURT IN AND FOR THE COUNTY OF DENVER
AND STATE OF COLORADO AND THE COUNTY OF DENVER
THE HONORABLE HAROLD A. GRANT, Judge
THE COLORADO RIVER WATER CONSERVANCY DISTRICT
CITY AND COUNTY OF DENVER, Acting by and through its Board of Water Commissioners
TRIAL COLORADO WATER CONSERVANCY DISTRICT
the NEW JERSEY ZINC COMPANY, Intervenor

On Writ of Certiorari to the Supreme Court of the
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 87

UNITED STATES, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO AND THE JUDGE THEREOF,
THE HONORABLE HAROLD A. GRANT, *Respondents*
THE COLORADO RIVER WATER CONSERVATION DISTRICT,
CITY AND COUNTY OF DENVER, acting by and
through its Board of Water Commissioners, CEN-
TRAL COLORADO WATER CONSERVANCY DISTRICT, and
the NEW JERSEY ZINC COMPANY, *Intervenors*

On Writ of Certiorari to the Supreme Court of the
State of Colorado

BRIEF FOR RESPONDENTS AND INTERVENORS

STATUTE INVOLVED

In the Government's Brief (at 2) part of 43 U.S.C.
666 (Act of July 10, 1952, 66 Stat. 560) is set forth as
follows:

Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs.

Consent is given to join the United States
as a defendant in any suit (1) for the adjudica-
tion of rights to the use of water of a river
system or other source, or (2) for the adminis-

tration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

We think 666(b) and (c) also pertinent as follows:

- (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
- (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

QUESTIONS PRESENTED

- (1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.
- (2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

STATEMENT

In October 1967, upon the petition of the Colorado River Water Conservation District ¹, the District Court for Eagle County, Colorado issued a Notice of Application for Supplemental Adjudication of Water Rights (A. 3-4) covering the Eagle River and its tributaries,² an intrastate river system³ tributary to the Colorado River. The notice, in addition to advising of certain claims to the use of water by the District, designated December 22, 1967 for the beginning of the taking of evidence in the adjudication and notified all "owners and claimants . . . to file a statement of claim and to appear . . . in regard to all water rights owned

¹ The Colorado River Water Conservation District is a public agency of Colorado and is comprised of all of 12 and part of 3 other counties in western Colorado. It was established in 1937 by the State Legislature (Colo. Rev. Stat. § 150-7-1 (1963)) for the purpose of conserving and developing the waters of the Colorado River and its tributaries within Colorado.

² When this proceeding was instituted the Eagle River system was totally contained in what was then known as Water District No. 37. The 70 then existing Water Districts have since been replaced by 7 Divisions under the Water Rights Determination and Administration Act of 1969, codified as Colo. Rev. Stat. 148-21-1, et seq., as amended (1963). With the exception of the Gunnison River, the Colorado River and its tributaries within Colorado, including the Eagle River system, are now in Division 5.

³ The Eagle River is a substantial tributary of the Colorado River in Colorado. The mainstream is about 65 miles in length, and of numerous tributaries, some 17 totalling an additional 180 miles may be considered major water producers. The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions.

or claimed by them.” (A. 3) This notice was served on the United States pursuant to 43 U.S.C. 666(b)⁴.

Although the United States moved that it be dismissed “. . . for lack of jurisdiction . . .” (A. 5), it nevertheless noted in a supporting memorandum that it would claim rights to some 228 specific uses of water, some of which had been filed as early as 1939 with the State Engineer pursuant to State law, as well as to rights related principally to the withdrawal and reservation of lands for the White River National Forest (A. 6-7). In a later supplement to this memorandum, the United States raised its claimed uses under the national forest reservation from 228 to 375 and also claimed a considerable variety of other specific uses on lands within the Eagle River drainage (A. 8-9).

When the respondent court denied the motion to dismiss and calendared the case, instead of actually filing the claims its memorandum referred to so that they could be known and evaluated, the Government applied to the Supreme Court of Colorado for a writ of prohibition (A. 10-15), at the same time advising that court (A. 14):

It should be pointed out, of course, that if *this Court* were to find that this Application and its supporting brief misstate Colorado law and *were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriate rights, most of the objections of the United States to these adjudications would be removed.* (emphasis added)

⁴ The requirements of Fed. R. Civ. P. 4(d)(4) were also observed.

The Supreme Court of Colorado issued a rule to show cause to the court below (A. 16), answer was made (A. 17-18), and the Colorado Supreme Court reviewed the case on briefs and oral argument.⁵ This resulted in an order discharging the rule (A. 45), under an opinion which held that 43 U.S.C. 666 gave jurisdiction to the respondent district court to consider all of the claims of the Government from whatever source derived (A. 41) and that that court, in so doing, could bring before it whatever parties might be necessary to an adjudication of the Government's claims (A. 42-43). The court below further held that questions concerning reserved rights, their amounts and their priorities should await the actual presentation by the United States of its specific claims, following which a final decision could be made (A. 37).

Notwithstanding the fact that the Colorado Supreme Court opinion seemed to satisfy the above-quoted concerns advanced by the Government in seeking prohibition, the United States nonetheless sought certiorari on the scope of jurisdiction conferred on State courts by 43 U.S.C. 666. The petition for the writ admitted that the decision below did not terminate the entire litigation but urged that the question of whether the respondent court had jurisdiction under Section 666

⁵ The Colorado River Water Conservation District appeared on behalf of and in support of the action of the respondent court denying the motion of the United States to dismiss. Other respondents below were parties in the adjudication proceeding. The City and County of Denver is the largest single user of water in the State and a substantial part of its water supply will come from the Eagle River system. The Central Colorado Water Conservancy District is a claimant of water in that area and New Jersey Zinc Company is also an owner, user and claimant of water in the area. All are affected by the rights the United States indicates it would claim.

to adjudicate the water rights of the United States, including its reserved rights, was separable from the merits and that thus the question of jurisdiction should be considered by this Court now (Petition 7-9). Since the application for certiorari made it clear that the jurisdictional issue would persist, counsel for the respondent court urged this Court to grant the writ and affirm the ruling on jurisdiction in both courts below, to the end that no further time be lost in this highly critical area of the adjudication and administration of rights to the use of water. By order issued on March 30, 1970 this Court granted the writ, and placed the case on the summary calendar (No. 1178, Oct. Term, 1969).

SUMMARY OF ARGUMENT

I

Under its plain meaning, 43 U.S.C. 666 consents to the joinder of the United States in the respondent district court for the adjudication of all the rights to the use of water it may own or claim together with the claims of others, including any rights which may be claimed as a consequence of the establishment of a reservation, in this instance the White River National Forest. Certainly the statute requires the presence of the United States for the rights it indicates it will claim under State law, yet the United States moved for dismissal as to it for all purposes, for lack of jurisdiction. Just as this was manifestly wrong, so is the effort to escape jurisdiction for any other rights it may claim. The position of the United States amounts to an assertion that Congress sheltered it in this regard but the legislative history is overwhelmingly to the contrary. As we show, Congress considered this matter

over the period 1949-1952. After listening over these 3 years to Federal objections to State court jurisdiction Congress rejected them out of hand for the immensely practical reason that the States had long established and highly regarded systems for providing certainty in the conservation and use of water.

II

The issue on which the Government sought certiorari in this Court was whether the respondent court had jurisdiction to entertain the Government's claims. The respondent court supported that effort in order to put the jurisdictional issue to rest and this Court accepted the case on that basis. Now the Government in effect seeks a declaratory order "reaffirm[ing] the principle that the United States has reserved water rights" while at the same time asking this Court to dismiss it from any adjudication. The reason to reaffirm reserved rights, we are told, is that the court below made statements "casting doubt on their existence [thus underlining] our concern that State courts and State law together would . . . eliminate such rights." *If* the court below does in fact do that, then is the time for informed review of the question. But the court below has not done so and thus the question is not here. Even if it were, the many unresolved questions concerning reservations and whatever water rights may attach thereto make it clear that this Court should await a factual determination below before proceeding further, assuming any further action at that time is necessary. This Court has not heretofore made a blanket reaffirmance of the reservation principle and should not now. It has only been enunciated in the past when the facts before the Court justified its implication.

III

As noted, in seeking prohibition the United States told the Supreme Court of Colorado that if it:

“were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed.” (A. 14)

Assuming these conditions, the only reason the United States gave to deny joinder under Section 666 was “for the reason that an entire river system would not be involved.” In supporting certiorari we pointed out the obvious—the statute does not say “entire river system”. It says “river system or other source”. The United States now modifies its views as to river system and says the cases are not “necessarily dispositive” of the situation here. But, the Government further says, even if an entire river system is involved, and even though the Colorado Supreme Court has ruled that the respondent court can bring in all parties necessary to an adjudication of the Government’s claims, jurisdiction over the United States is still lacking as whomever should have been were not parties at the time of the attempted joinder of the United States. The Supreme Court of Colorado had no difficulty at all in finding the proceedings to be a general adjudication under Colorado law to which all necessary parties could be joined once the United States actually filed its claims. In the face of these rulings we think the most recent argument of the United States is strained indeed. If it will actually put all of its claims before the court as Congress intended in enacting Section 666, the court can resolve any question of additional parties. Before the Govern-

ment claims are submitted to it the court can do nothing about service upon others possibly affected by such claims. Furthermore, the Government's view of a "general" adjudication can obviously never be reached as long as the Government itself, as an admitted claimant, will not permit itself to be joined.

ARGUMENT

Introduction

The arid west of a hundred years ago, with its limited and highly seasonal water supply and lack of substantial ground water, created an imperative necessity for a suitable system of law to define rights in the waters of its streams if the land was to be made habitable and people led to invest their lives and property in its development.

Colorado early set the pattern by judicial decision,⁶ which recognized a new system created by settlers even before statehood referred to as the law of prior appropriation. Thereunder, whomever applies the water of a stream to beneficial use may continue such use in times of water shortage to the exclusion of later appropriators. The right of the first user to relate back to the beginning date of his usage protects such an appropriator in making the investment necessary to make the water useful and the semi-desert habitable.⁷

A salutary characteristic of the right to the use of water under the law of appropriation is that unless

⁶ *Coffin v. Left-Hand Ditch Co.*, 6 Colo. 443 (1882).

⁷ The origins and workings of the law of prior appropriation as developed and administered in the 11 western states is set out briefly and very cogently at p. 142 of *One Third of the Nation's Land*, A Report to the President and the Congress by the Public Land Law Review Commission, June, 1970.

required, water may not be diverted, but must be left for others who have a need. While a water right may not be created for a speculative purpose, nevertheless an appropriation may be made for a foreseeable future use.⁸ Contrary to the Government's assertion (Brief 9), the appropriation system was predicated on the need to conserve as well as to utilize water. The system does not promote inflexible rigidity, as the Government implies, but seeks to accommodate all requirements when they are brought into the established State procedures so they can be identified. The Government, by insisting that reserved rights may not be brought into such proceedings, has generated "uncertainty [which is] an impediment to sound coordinated planning for future water resources development."⁹ To the end that there could be certainty in both Federal and non-Federal uses of mainstream Colorado River water, this Court, in settling the decree in *Arizona v. California*, 376 U.S. 340, 343-346 (1964) established water rights of fixed magnitude and priority for certain Federal establishments. The possibility of an open-end decree for such reservations was specifically rejected by the Special Master because "... such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable [and] ... it would not give the United States any certainty as to the extent of its reserved rights..." (Master's Report 264).

The orderly cataloging of the various rights in relationship to each other has been perfected in all of the western States, and adjudication and administration

⁸ *Denver v. Sheriff*, 105 Colo. 193, 96 P. 2d 836 (1939).

⁹ PLLRC Report, *supra*, n.7, at 144.

of water for beneficial use is a highly organized and constantly operating function of State government. The efficacy of such systems is jeopardized unless the United States is joined where its presence is necessary and is required with all others to set forth its claims.

Recognizing this, Congress in 1952 enacted 43 U.S.C. 666, referred to as the McCarran Amendment, not to impair the Government's rights in water but to serve as a means by which all rights to the use of water could be made secure through requiring the United States to define its claims and have them adjudicated for all to know. Congress did not choose to establish a separate Federal system to accomplish this purpose, but directed that it be accomplished through the well-known, workable pattern for adjudicating and administering the limited water supply among various users, already long established by the States.

I. IN PASSING 43 U.S.C. 666, CONGRESS CLEARLY INTENDED TO SUBJECT ALL WATER RIGHTS OF THE UNITED STATES TO STATE PROCEEDINGS FOR ADJUDICATION OF WATER RIGHTS.

In view of what Congress was attempting to accomplish by the McCarran Amendment (43 U.S.C. 666), we feel the language used is clear and unmistakable. The legislative history is such that resort to rigid rules of construction is not necessary.¹⁰ While the United States agrees that Section 666 does waive immunity under certain circumstances with regard to rights obtained under State law, it contends that such waiver does not extend to reserved rights. To substantiate

¹⁰ The United States' attempted reliance on the doctrine of *ejusdem generis* is misplaced. That rule may not be used to defeat the obvious purpose of legislation. *Gooch v. United States*, 297 U.S. 124 (1936).

such conclusion they resort to a limited examination of the legislative history. Our review of the legislative history shows that three different committees of the House and Senate considered the matter over the period 1949-1952. We believe that the following examination of that legislative history establishes conclusively that Congress intended to permit the joinder of the United States in State proceedings for the consideration of any claim to water the Government might have.¹¹

A. S. 2305. To authorize suits against the United States to adjudicate and administer water rights, 81st Cong., 1st Sess. (July 21, 1949).¹²

This bill, quite obviously the genesis of Sec. 666, was introduced by Senator McCarran on July 21, 1949 and referred to the Senate Committee on the Judiciary. It provided very simply as follows:

That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: Provided,

¹¹ As was found by this Court in *Canadian Aviator Ltd. v. U.S.*, 324 U.S. 215 (1945) in construing the waiver of immunity under the Public Vessels Act, we think the Congressional action here in adopting broad statutory language authorizing suit was deliberate ". . . and is not to be thwarted by an unduly restrictive interpretation." (at 222). See also *U.S. v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951).

¹² The bill is reproduced as Exhibit 1 hereto, at 1e. For its introduction in Congress see 95 Cong. Rec. 9918 (1949).

That the United States shall have the right of removal to the Federal court of any such suit in which it is a party: Provided further, That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Peyton Ford, Assistant to the Attorney General, reported under date of February 27, 1950, that the Department of Justice was unable to recommend enactment of the bill. Mr. Ford's report described the bill in part as follows:

This measure would permit the joinder of the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights and is a necessary party to such suit.¹³

The reasons given for not recommending enactment were as follows:

The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the *piecemeal adjudication* of water rights, in turn resulting in a *multiplicity of actions* and the joinder of the United States in many actions, in all of which it would be required to claim *every right which it could conceivably have or need*, or subject itself to the possible loss of valuable rights on the theory of having split its cause of action. There is moreover,

¹³ This report is included in the Committee files on S. 2305 in the National Archives, Water Rights Legislation, 81st Cong., Record Group No. 48, File 8-14.

no reason to believe that in any instance in which it is desirable to do so, Congress would fail to authorize making the United States a party defendant in the litigation of water rights. (emphasis added)

It is at once apparent from the foregoing that the Department of Justice construed the language of S. 2305, which was almost identical with the language finally enacted as Sec. 666, as requiring the Government when joined to put forth every conceivable claim of right by the United States. The report is notable for its omission of any reference whatsoever to being limited to rights obtained under state law, or to the unsuitability of the appropriation doctrine, both of which are now claimed by the Government to militate against the applicability of 43 U.S.C. 666 in this case.

S. 2305 did not go to hearings, however, and the bill died with the adjournment of the 81st Congress.

B. S. 18. To authorize suits against the United States to adjudicate and administer water rights, 82d Cong., 1st Sess. (Jan. 8, 1951).¹⁴

On the opening day of the 82d Congress, Senator McCarran introduced S. 18, a bill identical with S. 2305 of the 81st Congress. Hearings were held on April 25, August 3 and August 8, 1951.¹⁵ The representative of the Attorney General made it clear throughout his testimony that the bill was viewed as embracing *all* manner of claims to water rights on behalf of the United States, including claims for reclamation, In-

¹⁴ This bill is reproduced as Exhibit 2 hereto, at 3e. For its introduction in Congress see 97 Cong. Rec. 86 (1951).

¹⁵ See Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951).

dian, Defense, forest and soil conservation purposes.¹⁶ It was urged that since individuals always had an opportunity to settle such problems by direct recourse to the Department of Justice, such recourse, or a waiver by Congress in individual instances, was to be preferred to the general waiver of immunity that the bill proposed. The general waiver, it was said, would not only lead to a multiplicity of suits, but was so broad that it would permit the institution of water rights suits between States to which the United States would be a necessary party, an issue which was extremely sensitive at the time.¹⁷ Also, as a "first point" against the bill as drafted, the spokesman for Justice referred to the provision for removal to a Federal Court and observed:

... But if this legislation as now written is enacted, you will have two procedures in existence in the State, and it would be a serious detriment to the small water user here if he were to sue the United States and we were to remove over here to the city and county of Denver and he would have to come across the mountain to protect his rights. I don't think that is desirable at all. . . .¹⁸

¹⁶ *Id.* at 6, 7.

¹⁷ *Id.* at 5, 6. This Court in *Arizona v. California*, 298 U.S. 558 (1936), dismissed Arizona's suit because the United States, a necessary party, had not consented to suit. As the hearings on S. 18 show, proposed legislation was pending at that time to authorize such a suit and also to authorize the Central Arizona Project utilizing water of the Colorado River. California was contending that no project should be authorized until a suit had determined whether Arizona was entitled to sufficient water for the project. Arizona preferred to have the project authorized first. The dispute led to this Court's decision in 1963 in *Arizona v. California*, 373 U.S. 546.

¹⁸ Hearings on S. 18, *supra*, at 5.

Other testimony similarly suggested that the removal provision be eliminated and that a provision be added making it clear that nothing in the proposal was to be construed as authorizing the joinder of the United States in original suits.¹⁹ Both suggestions were ultimately adopted.

The volume of the Hearings includes a copy of a report from Deputy Attorney General Ford to the Committee, dated August 3, 1951,²⁰ which is virtually identical to his report in opposition to S. 2305 of the 81st Congress. The Interior Department reported on the same date,²¹ similarly in opposition to the bill but with the interesting observation, which the Department thought warranted consideration, that waiver of immunity appeared appropriate under certain circumstances, including those adjudications limited:

... to ... those rights of the United States which depend solely upon having been acquired pursuant to State law ... [but] not ... to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years) ...

The views of the Department of the Interior thus went into considerable detail as to the fashion in which Congress could reshape the bill to make it acceptable. The Department did this after setting out a variety of situa-

¹⁹ *Id.* at 30-32, 47, 54.

²⁰ *Id.* 66-67. See also S. Rep. No. 755, 82d Cong., 1st Sess. 7 (1951).

²¹ *Id.* 67. See also S. Rep. No. 755, 82d Cong., 1st Sess. 7-8 (1951).

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ons in which it was in effect the "owner"²² of water rights, including many of those purposes mentioned in the Justice Department testimony.

It was accordingly clear beyond question that the language of the bill upon which these Departments were reporting, and upon which testimony was given, was considered by them and by the Committee to waive the immunity of the United States to joinder for the purpose of adjudicating *all* of its claims, from whatever source, or in whatever capacity those claims may have been derived. The Committee proceeded to report the bill to the Senate (S. Rep. No. 755, 82d Cong., 1st Sess. (1951)). This report recommended passage without reshaping the bill to adopt the views of Interior and made it clear in the following comment that the objections of Interior and Justice were being totally rejected:

The committee has taken note of the reports of the Department of Justice and Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the Committee, that the legislation is meritorious.²³

The Committee report proposed an amendment which deleted the removal provision and denied any construction constituting a waiver in original suits between States. In addition, S. 18 as reported made clear the Committee's intent that the Government could not claim by reason of its sovereignty the inapplicability

²² The word is the Department's. See Hearings on S. 18 at 67 and the extract from the report set forth in the opinion of the Colorado Supreme Court (A. 42). Note the significant, specific reference by Interior to rights for reservations.

²³ S. Rep. No. 755, 82d Cong. 1st Sess. 2 (1951).

of State laws in any proceeding to adjudicate or administer water rights.²⁴

The Committee report also contained a significant exchange of correspondence between Senators McCarran and Magnuson in which Senator Magnuson sought some clarification as to whether Section 1 could be used to block the proposed Hells Canyon project in the Columbia Basin, or any similar multiple-purpose project. He also submitted suggested language for the establishment of a "catalog of water rights, to which the several agencies lay claim".²⁵ With regard to the question on Section 1, Senator McCarran responded:

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.²⁶

Having thus reenunciated the central purpose of bringing in the United States in order to have a complete adjudication,²⁷ Senator McCarran went on to

²⁴ A copy of S. 18 as reported is reproduced as Exhibit 3 hereto at 5e.

²⁵ S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951).

²⁶ *Id.*

²⁷ The Government inaptly cites (Brief 25) this same paragraph of Senator McCarran's letter. He was here referring to the necessity of joining the United States as a party, heretofore immune to joinder, as related to the problem of certainty in water right adjudications.

agree enthusiastically with a catalog of claims of the several agencies and that proposal appeared as Section 2 of S. 18 as reported.²⁸

Despite this history, the Government contends that all the bill purported to do was to require the United States to appear in connection with water rights of the Government acquired pursuant to State law (Brief 12), quoting portions of S. Rep. No. 755 and of a discussion on the Senate floor on October 11, 1951. These extracts, however, only serve to point up the Committee's recognition that even in connection with rights already adjudicated and held by the Government under State law, the orderly administration of those rights could be frustrated by a non-consenting sovereign. Congress was not only seeking to correct this situation, but to provide for the utilization of the well established State systems for adjudication and administration of the rights of all water users, whether owners or claimants. Thus Senator McCarran explained to the Senate on October 11, 1951 (97 Cong. Rec. 12948):

... Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all the parties *owning or claiming* to own any rights to the stream. If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill and confusion results.

The necessity that all *owners or claimants* of water rights on a given stream be joined in a suit for the adjudication of water rights is conceded. (emphasis added).

²⁸ See Exhibit 3 hereto at 6e-7e.

In addition, the *full* statement of the "purpose of the proposed legislation" (completing the extract set forth at U.S. Brief 14) which Senator McCarran gave to the Senate is important to the proper construction of the statute. That statement was as follows (97 Cong. Rec. 12947 (1951)):

Mr. President, the purpose of the proposed legislation is to permit the United States of America to be joined as a defendant in any suit for the adjudication of rights to the use of water from any water source, or for the administration of such rights, *where it appears that the United States is the owner*, or is in the process of acquiring ownership of rights by appropriation under State law, and where there is a showing that the United States is a necessary party to such adjudication. *Section 2 of the bill provides for the development of a catalog of water rights owned by the United States to be kept by the Secretary of the Interior for the purpose of reference thereto as the need may arise. The bill specifically excepts the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.* (emphasis added).

The "rights owned" by the United States, as Senator McCarran described them, to be cataloged in Section 2, clearly are of the same nature as the rights of which the United States is the "owner" in Section 1.

In additional explanation of Section 2, Senator McCarran advised the Senate (97 Cong. Rec. 12948 (1951)):

It also establishes a place where the United States Government itself may go on short notice to de-

termine *any or all* of its holdings.²⁹ (emphasis added)

Thus, the phrase "or is in the process of acquiring water rights by appropriation under State law" does not limit the term "owner" but rather expands it.

Indeed, the logical construction of the statute, and its plain meaning, is that the United States was to be made a party not only where it claimed to be the owner of rights to use water but also where it was in the process of acquiring such rights, as, for example, had been its custom pursuant to Section 8 of the Reclamation Law.³⁰

Senator McCarran's statement paraphrases the language of the proposed bill. As finally adopted, the statute reflects the clear purpose of Congress to utilize State processes for the adjudication of *all* rights of the United States, whether through ownership derived from any asserted Federal authority or as a claimant of rights derived under State law. Senator McCarran's words emphasized the coverage of adjudications under the laws of many States, of rights of "all the parties *owning or claiming to own* any rights to the stream." (97 Cong. Rec. 12948, emphasis added). If Congress had intended to limit "owner" (the Government's contention requires this), it would have then specified the limitation. Instead, Congress followed the pattern

²⁹ A reading of Section 2 (see Exhibit 3 hereto) makes it clear beyond question that the catalog was to include every conceivable right to water on behalf of the United States, even to military purposes and hydroelectric power production.

³⁰ Act of June 17, 1902, as amended, 43 U.S.C. 383, 32 Stat. 390. See *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 759-761 (1950).

used by many of the States in referring to owners and claimants separately while handling their rights and claims in one proceeding.

In April 1952, the Senate Judiciary Committee issued a second report on S. 18 (S. Rep. No. 755, Part 2), which explained the addition of the numbers in Section 1 of the bill ³¹ and said with regard thereto:

... this amendment does not in any way change the effect of section 1 as reported but simply rearranges the language thereof so as to make the intent thereof clear and unmistakable. (S. Rep. No. 755, Part 2, 2).

S. 18 as thus amended passed the Senate on June 21, 1952 (98 Cong. Rec. 7817-18).

At the same time that S.18 was pending in the Senate, bills of similar import were pending in the House.³² Reporting on one of such bills under date of June 27, 1952, the Bureau of the Budget observed: ³³

Section 3 of the subject bill apparently grants consent for suits against the United States involving the acquisition, determination, or exercise of rights to the diversion and use of water to be brought in State courts and prohibits removal of such suits to a Federal court upon petition of the United States. *The Secretary of the Interior and the Attorney General recommended against the enactment of similar provisions in a bill, S.18, recently passed by the Senate. As pointed out by*

³¹ The full amendment appears as Exhibit 4 hereto, at 9e.

³² See e.g. H.R. 5735 and H.R. 7691 of the 82d Congress, reproduced as Exhibits 5 and 6 hereto, at 11e and 13e.

³³ On H.R. 7691. National Archives, Water Rights Legislation, 82d Cong., Record Group No. 48, File 8-14.

these agencies, enactment of such a law would result in a multiplicity of actions and the joinder of the United States in many actions wherein it would be required to claim every right it could conceivably have or need, or be subjected to the possible loss of valuable rights on the theory of having split its cause of action. Such a situation would impose heavy financial burdens not only on the Federal Government but also upon State judicial systems and even private individuals who could be forced to participate in this type of litigation in order to protect their own rights. (emphasis added).

The significance of the foregoing is at once apparent. This was a comment not by one agency or department but from the Executive Office of the President, relating not only to H.R. 7691 then pending before a House Committee, but to S.18 which had only recently passed the Senate and was then pending in the House for action (98 Cong. Rec. 7882 (1952)).³⁴ The insistence in these comments that S.18 would require the United States to "claim every [water] right it could conceivably have or need" is totally inconsistent with the present argument that consent was not granted to adjudicate claimed reserved water rights.

³⁴ There were a number of other matters pending before Congress which became the occasion for comment on S.18 and on the subject of the importance of State water rights. For example, Senator Knowland included the texts of S.18 and S. Rep. No. 755 thereon in comments he made on the Santa Margarita River litigation (98 Cong. Rec. 120-129 (1952)), a then bitter controversy arising out of a suit brought by the United States asserting water rights for the huge Marine Base near San Diego known as Camp Pendleton. See *U.S. v. Fairbrook Public Utility District*, 101 F. Supp. 298 (S.D. Cal. 1951). Other proceedings in this case are found at 108 F. Supp. 72 (1952), and 109 F. Supp. 28 (1952).

C. Section 208 of H.R. 7289, Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1953, 82d Cong., 2d Sess. (1952)

The provisions of Section 1 of S.18 (with one additional subsection) became law as Section 208 of H.R. 7289, providing appropriations for the Justice Department for fiscal year 1953.³⁵

Section 208 as passed by the House barred the use of any funds for any suit by the Government against a State or against more than 2500 defendants, the latter provision of which was apparently expected to stop the Santa Margarita case³⁶ (98 Cong. Rec. 3555-3556). The Justice Department wrote Senator McCarran, as Chairman of the Senate Appropriations Committee unit which would hear the House bill, and asked that the Senate Committee "eliminate" Section 208.³⁷ Senators Knowland and Nixon also wrote to the Committee pointing to a number of instances in which they thought the House version would have too broad an effect but still urging language which would deny funds to continue the case in question "... until Congress can take action on legislation such as S.18 or H.R.5368. . . ."³⁸

The Solicitor General of the United States was the chief spokesman for the Department at the Senate hearings. Senator McCarran, while stating his frank

³⁵ Act of July 10, 1952, P.L. 495, 82d Cong., 2d Sess., 66 Stat. 560.

³⁶ See n. 34, *supra*.

³⁷ See Hearings on H.R. 7289 before the Subcommittee of the Senate Appropriations Committee, 82d Cong., 2d Sess. 1339 (1952).

³⁸ *Id.* 1345. Note at 1346-47 Colorado Senators Johnson and Milliken had also written to the Committee expressing concern as to the effect of the House version of Section 208 on then pending litigation in Colorado. See n. 40 *infra* on H.R. 5368.

opposition to the Government in the Santa Margarita case, nevertheless said that Section 208 as passed by the House was not the remedy.

The following colloquy then ensued:³⁹

Senator McCarran. Why is it your department is opposing my Senate bill 18, which to my mind runs along this very line? In other words, I am an owner of a water right on the Truckee River. It has a priority of 1860. In order for me to adjudicate my water rights, if I were to attempt to, if they were in doubt, I would have to bring, if the Government owned land on the Truckee River to which a water right applied, I would have to bring the Government in. I couldn't ever adjudicate my water right, because I have got to bring in all the water users of that system. That is all this S.18 does, to provide that the Government of the United States be brought into court to determine its water rights if, as, and when it has water rights on a certain system. I cannot figure out why you fellows are opposing it.

Mr. Perlman. I do not know that it came to me. I have some recollection about a discussion as to whether the Department should agree that the United States should be made a defendant in controversies over water rights between States. . . .

Senator McCarran. That is not my intention at all.

Mr. Perlman. That is what I think is what motivates any opposition to it.

At a further Committee session held on June 23, 1952, Senator Knowland appeared on behalf of Senator Nixon and himself and urged the adoption of the substitute language they had proposed for Section 208.

³⁹ *Id.* 1349-50.

In the course of his remarks, Senator Knowland referred to the Santa Margarita project bill H.R. 5368⁴⁰ and in discussing its general purposes observed:⁴¹

... In addition, Mr. Chairman, section 4 imposes on the Federal Government the requirement of proceeding in conformity with the laws of the States with respect to the proper use or distribution of water and shall not interfere with or acquire any vested right except upon specific authorization and upon due compensation being paid therefor.

I might point out, Mr. Chairman, that this provision is similar in theory to S.18, which was introduced by the chairman of this subcommittee.

Mr. Chairman, if there is no objection, might I ask that H.R. 5368, a companion to S.2809 introduced by Senator Nixon and me, be introduced at this time in the record?

SENATOR MCCARRAN. That will be done, and we will also insert S.18 in the record at this point.

S. 18 was thus again brought to the fore. After some further discussion, the McCarran-Knowland exchange of views ended with the following:⁴²

SENATOR MCCARRAN. I want to draw your attention, Senator Knowland, to the fact that the Senate on Saturday passed S. 18, and I am putting it in the side slips for the consideration of the committee. I was wondering if it would take the place of the amendment offered by the House, the substitute offered by you and Senator Nixon.

⁴⁰ H.R. 5368 was a bill to settle the Santa Margarita River litigation controversy by providing a water supply project for the area. It included a Section 4 relating to complying with State law.

⁴¹ See Hearings, *supra* n. 37, at 1802.

⁴² *Id.* 1807.

SENATOR KNOWLAND. I have not had a chance to examine the slight changes which were made in S. 18 in the Senate on Saturday, but I will have that explored to see whether that would be possible . . .

The Senate Committee's report ⁴³ on the bill recommended that Sec. 208 as inserted on the House floor be deleted and:

As a substitute . . . the Committee recommends that the following provision be included in the bill, this provision having passed the Senate on June 21, 1952, as a part of S.18.

There was then set forth all of Section 1 of S. 18, renumbered, however, as Section 208(a), (b), and (c) as ultimately adopted. On the same day, Senator McCarran separately announced on the Senate floor his intention to offer this as an amendment to H.R. 7289 and the text was printed in the Record (98 Cong. Rec. 7893). Two days later, when the bill came up for debate, the amendment, now known as the McCarran Amendment, was adopted. Senator Knowland concurrently brought up the language proposed by Senator Nixon and himself to deny funds for the Santa Margarita case. Senator McCarran said that this could be added to Sec. 208 as a new subsection (d) and that it could well go to a conference with the House. This was agreed to (98 Cong. Rec. 8109-8110), and the bill went to conference.⁴⁴

In action in the House on the conference report, the full McCarran Amendment, including the Knowland

⁴³ S. Rep. No. 1807, 82d Cong., 2d Sess. 10 (1952).

⁴⁴ There were two conference reports on H.R. 7289, H.R. Rep. No. 2454 and H.R. Rep. No. 2485. Both reported Sec. 208 as "in disagreement".

addition was read and debated (98 Cong. Rec. 9444-9447). While the bulk of the discussion concerned the Knowland addition, Congressman Rooney in opposing all of Section 208 read some comments from the Marine Corps as follows (98 Cong. Rec. 9445):

Section (208) incorporates into the appropriation bill the language of S.18, which gives consent to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or (2) for the administration of such rights where the United States is an owner or contemplated owner. The effect of such legislation to give a blanket waiver by the United States of its immunity from suit in actions of this kind, opens the way for piecemeal adjudications of water rights in the various State courts, with the United States compelled to defend itself in a multiplicity of actions. In such a situation the United States will be subjected to the probable loss of valuable water rights. The Department of Justice protested vigorously against the enactment of S.18, which now has been inserted in the appropriation bill where no such legislation belongs.

The foregoing reiteration of the clear understanding, by all concerned, of the essence of S. 18 leaves no room for doubt that Congress intended (1) all Federal rights must be asserted upon joinder of the United States in a State court, and (2) that part of a watershed could be adjudicated even though this resulted in "piecemeal adjudication". To make this even more definite, Congressman Rooney, after reading the following from the memorandum:

. . . It is unthinkable that Congress should in an appropriation bill pass substantive legislation making the United States defend itself in all manner of suits over water rights, and, at the same time,

preventing the United States from obtaining an adjudication by the courts of its own rights in such a vitally important matter.

then said:

Under the language of section 208, you would have to have an assistant attorney general defending the United States Government in every one of the State courts of the State of California and other Western States, and the cost therefor[e] added to the payroll of the Department of Justice merely to defend valuable water rights of the Federal Government would be enormous. This is about as spendthrift a proposition as I have seen in a long time.

With the issues thus in sharp focus the vote came on Mr. Rooney's motion to concur in the Senate action of changing the House version of Section 208, but to then strike the entire Senate amendment. This motion lost on a roll call vote 181-119 (98 Cong. Rec. 9446), and the House then receded and concurred in the Senate amendment. The date was July 4, 1952. The President signed the bill into law on July 10. This was almost precisely three years from the date on which Senator McCarran first introduced his proposition in the Senate in the form of S. 2305.

It is manifest from the foregoing legislative history that the Congress had long and arduously considered the effect of adopting the McCarran Amendment and was determined to act so as to subject the United States, when a necessary party, and every right it owned or claimed in water, to State proceedings for the adjudication of water rights.

II. UPON THE RESOLUTION OF THE QUESTION OF JURISDICTION, WHICH IS ALL THAT WAS DECIDED IN BOTH COURTS BELOW, MANY UNRESOLVED ISSUES REMAIN FOR TRIAL AND DETERMINATION BEFORE CLAIMS UNDER THE RESERVATION DOCTRINE WILL BE RIPE FOR REVIEW IN AN APPELLATE COURT OR BEFORE IT MAY PROPERLY BE ASSERTED THAT STATE PROCEEDINGS "ELIMINATE" (BRIEF 20) SUCH RIGHTS.

The Government's request that this Court "reaffirm the principle [of] reserved water rights" (Brief 20) prior to a presentation of specific claims is premature, unnecessary to a decision of this cause, and presents a question not before the Court on certiorari.

The question raised by the United States in seeking certiorari was whether the respondent court had jurisdiction—a distinct and sharply focused issue—not that the existence of reserved rights throughout the West must be reaffirmed. The latter raises an issue going far beyond the scope of the arguments heard in the court below and which was not presented in the petition for a writ of certiorari filed by the United States. Indeed, on page 6 of its petition, the Government stated that ". . . the [Colorado] court did not expressly decide that the United States has no reserved water rights in Colorado . . .". The Supreme Court of Colorado did in fact state (A. 37):

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn.

The issue which *is* in contention here is the scope of the waiver of sovereign immunity under 43 U.S.C.

666. As the Government stated in its petition for a writ of certiorari (p. 7), this issue of jurisdiction was clearly "separable from the merits", and had the finality (since not subject to further review in the State courts) requisite to this Court's jurisdiction under 28 U.S.C. 1257.⁴⁵ All other issues in the case, including the extent of reserved rights, are still unresolved below. They are thus not only lacking in the finality necessary for a proper review here, but are plainly premature for consideration.⁴⁶

The United States itself said, in seeking certiorari, that the reach of consent to suit under Section 666 "has never been definitively construed by this Court" and that it was important that this be done (Petition 11). We concurred⁴⁷ and suggest that once this has been done State courts will be fully equipped to pass on whatever specific claims may be advanced whether based on appropriation, purchase, reservation, or

⁴⁵ *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916). Like the instant case, *Mt. Vernon* involved the denial by a state supreme court of a petition for writ of prohibition to prevent a state court from taking jurisdiction on the ground that to do so would violate Federal law. Mr. Justice Holmes disposed of an argument that the state supreme court's denial of the petition was not a final judgment saying: "Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment . . . the fact that it does not decide the merits . . . is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought." *Id.* at 31. (emphasis added).

⁴⁶ It appears to us that this attempt to raise other issues clearly transgresses this Court's Rule 40 (1) (d) (2) concerning the raising of additional questions. See *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *J. I. Case Co. v. Borak*, 377 U.S. 426, 428 (1964).

⁴⁷ Respondents' Brief in Support of Certiorari, p. 1.

otherwise. We accordingly urge that the Court decline the invitation to expand into determinations on the merits until specific claims have been presented and rulings made.

It is not enough to say that the court below has "strongly suggested" (Brief 4) that the United States does not have reserved rights or that it has made statements "casting doubt" (Brief 20) on their existence. Who will know what those claims are until they are specifically asserted as the court below suggests they be? An interpretation of 43 U.S.C. 666 which would require the United States to demonstrate its claims for water rights under the reservation doctrine would be the best means whereby the Government's contentions could find expression in a properly justiciable controversy.⁴⁸

The Government plainly misconstrues the court below in charging that the cases cited by the United States in support of its claimed reserved rights—*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435—were held as not "determinative" as a consequence of the Colorado Constitution and *Stockman v. Leddy*, 55 Colo. 24 (Brief 4-5). What the court *did* say was that *Stockman* was the

⁴⁸ The Government's admission (Brief 19-20) that "... the Colorado Supreme Court has not specifically denied the existence of federal reserved water rights in Colorado or elsewhere in the West", shows that the requisite "Case or Controversy" as required by Article 3 Section 2 clause 1 of the Constitution is lacking here. We do not have a situation admitting of specific relief through a decree of conclusive character within the meaning of *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937).

only *Colorado* case it had found that was "determinative" against the assertion that the United States did have reserved water rights and that it would postpone consideration of whether *Stockman* is to be overruled until after the United States presented its specific claims and the issues of fact and law were clearly drawn (A. 37).⁴⁹ A court which had only been asked to decide jurisdiction could hardly speak otherwise because the decision on jurisdiction contemplated—as the United States recognized in seeking certiorari—that the United States would be participating "in the ongoing proceeding in the State district court." (Petition 7)

The United States should go back to that court for a determination of all of its claims before it comes here expressing concern that "State courts and State law together would, in fact, eliminate such rights" (Brief 20). At least one reason for the need for such a determination is that most and possibly all reserved rights claimed to exist must be implied if they are to be found at all, and then quantified to bring certainty in water use. This Court found in *Arizona v. California*, 373 U.S. 546, that the reserved rights claimed

⁴⁹ As noted in the opinion below, the Government had urged the reservation doctrine as a bar to adjudication and the Central Colorado Water Conservancy District, a party here, had urged the Colorado constitution and *Stockman v. Leddy*, 54 Colo. 24 (190) in support of its opposition to the Government's argument. It certainly was appropriate for the court to review the contentions of counsel but the fact remains that a determination on the merits has yet to be made in the Colorado courts. (A. 34-37). As the court below stated: "... we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound." (A. 37).

for Indian Reservations had to be implied (at 599), as had been the case in *Winters v. United States*. The Special Master in *Arizona v. California* had found "... the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation".⁵⁰ He thus took a great amount of evidence concerning these Reservations, including their population, economy, acreage and water requirements and then quantified the water rights for five Reservations on the mainstream of the Colorado River, rejecting the possibility of an open-end decree,⁵¹ in order to "establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." This Court specifically approved the Master's findings that a reservation of water had been intended for each of the five Indian Reservations involved, agreed with his conclusion as to the quantity of water intended to be reserved, and found the various irrigable acreages included by the Master in reaching quantities of water to be reasonable.⁵² This specificity in treating with conflicting claims in this vital area of water rights is in our view the great contribution of the adjudicatory process, and was what Congress intended

⁵⁰ *Arizona v. California*, No. 8 Original, Oct. Term, 1962, Report of Special Master Simon H. Rifkind, Dec. 5, 1960, at 259.

⁵¹ "[which would] simply [state] that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment." *Id.* 263-264.

⁵² 373 U.S. at 600, 601.

in consenting to the joinder of the United States in State proceedings for the consideration of all claims.⁵³

The necessity for doing away with the uncertainty engendered by the implied reservation doctrine is strongly urged in the recent Public Land Law Review Commission Report.⁵⁴ That Report also details problems arising out of the reservation concept, most if not all of which require some evidentiary proceeding before a determination could be made.⁵⁵ These unresolved issues in connection with reservations provide additional reasons why we urge this Court to decline the Government's invitation to generalize now on the reservation principle.

⁵³ This Court in *Arizona v. California* approved the fact that the Master declined to adjudicate claims by the United States for other Indian Reservations and federal establishments, particularly those relating to tributaries (*Id.* 595). The Master found it inappropriate to adjudicate matters of intrastate rights and priorities on the tributaries (Master's Report 332-334) and this Court noted that under § 18 of the Project Act "regulation of the use of tributary water" was left to the states (*Id.* 588). The Master did adjudicate conflicting claims of the States and of the Government on the Gila River because this was an interstate tributary on which the controversy was immediate and requiring of decision. But even here he declined to approve a claim on behalf of an Indian Reservation located in Arizona against (1) users of water in New Mexico because the evidence showed it to be impractical, as well as against (2) users of water in Arizona because this was a matter of "intrastate rights and priorities". (Report 333-334). These few references show the desirability of an adjudication and a record before reaching conclusions as to the extent of any claims to the use of water.

⁵⁴ *One Third of the Nation's Land*, A Report to the President and the Congress by the Public Land Law Review Commission, June 1970.

⁵⁵ *Id.* 144.

To dispose of the uncertainty and other problems in the reservation doctrine the Commission suggests legislation to:

1. Provide a reasonable time for Federal agencies to give public notice of water needs for reserved areas and forbid assertion of reserved claims not so published.
2. Establish procedures for administrative or judicial determination of the reasonableness of the quantity claimed, or the validity of the proposed use under present law.
3. Provide that express reservations of water be made in connection with any future reservations of land, and
4. Require that compensation be paid where application of the implied reservation doctrine interferes with uses vested prior to the *Arizona v. California* decision in 1963.

While these are worthwhile objectives, as is clear from the legislative history of 43 U.S.C. 666, Congress has already declined to provide the "catalog", which 1 would provide, presumably because it thought that consent to suit would reach the same end. As far as 2 is concerned, in passing Section 666 Congress provided that established State adjudicatory procedures should handle questions such as the "reasonableness of the quantity claimed under the reservation doctrine, its priority date, and the purpose for which the reserved water may be used".⁵⁶ These were precisely the matters the Master decided in *Arizona v. California* to provide certainty on the river, just as can be done in State adjudications.

⁵⁶ The Report at 148-149 notes that these matters should be subject to judicial review, presumably when first decided in some administrative, rather than judicial proceeding.

As far as items 3 and 4 above are concerned, the past has shown it would indeed promote certainty in water rights for Congress to make specific provision for them in withdrawing or reserving lands so that such rights would no longer have to be implied. Also, if Congress wishes to provide compensation for any vested rights taken subsequent to *Arizona v. California*, this is certainly within its power. However, these suggestions go beyond the questions here.

The statement in the Commission Report that "The McCarran Act [sic] . . . is an unsatisfactory vehicle for obtaining definition of Federal reservation claims"⁵⁷ is quite understandable in that adjudications thereunder will certainly not define *all* the Federal reservation claims within "the reasonable period of time" in which the Commission wants agencies to publish their projected water requirements. However, an adjudication under Section 666 will certainly produce the quantification which the Commission wants on those "river systems or other source[s]" of water where, as here, the local water users join the Government in order that the rights of all may be fixed and determined, and where it appears that the Government is a necessary party in order to reach these results. Local water users are entitled to such certainty now and this is precisely what Congress intended in enacting the McCarran Amendment. Regardless of the improvements which any study may suggest in these procedures, the Government should delay no longer in putting its claims before the courts so that a start toward the certainty that the Public Land Law Review Commission finds essential—as this Court did in *Arizona v. California*—may be had.

⁵⁷ *Id.* 148.

III. THE PROCEEDING IN THE RESPONDENT COURT WAS A GENERAL ADJUDICATION OF WATER RIGHTS FROM A RIVER SYSTEM OR OTHER SOURCE WITHIN 43 U.S.C. 666.

The Government contends that the proceeding in the respondent court was not a "general" adjudication, and thus not within 43 U.S.C. 666, because it "does not embrace an entire river system"⁵⁸ (Brief 7) and all parties claiming water rights were not before the court.

In discussing whether there is a river system in this case, the Government concedes that the cases are not dispositive (Brief 27), but contends:

... it seems apparent from the legislative history that Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate only fragments of recognizable river systems. (Brief 27, emphasis added).⁵⁹

⁵⁸ Ignoring entirely the actual language of the statute: "for the adjudication of rights to the use of water *of a river system or other source*". Also, as the Court below observed, the word "entire" is not in the statute. (A. 29).

⁵⁹ The Government continues with its complaint about "piecemeal adjudications" and suggests that (1) where a river system is wholly contained within one state (as here) the "proceeding should at least relate to the entire system"; and (2) where a river system traverses the boundaries of a single State "the United States should not . . . be required to assert its rights in any proceeding that is less than statewide in character." (Brief 28). While the foregoing is unclear to us it nevertheless seems to be inconsistent with what the Government told the court below in seeking prohibition: "... while it may not be necessary to conclude that all users of the Colorado System in Colorado must be joined we believe all users outside a Water District that would be substantially affected by diversions in a Water District are necessary parties to a proper general adjudication under 43 U.S.C. Sec. 666." (Record 30, 62.)

We submit that the legislative history demonstrates precisely the opposite. Congress was well informed as to the possibility of numerous suits and nonetheless found the legislation meritorious. This possibility was specifically raised by the Bureau of the Budget and pointed out on several occasions by both the Departments of Justice and Interior. The objections were noted by the Committee when passage was recommended.⁶⁰ At the very moment of final consideration Congressman Rooney counselled against passage because of this very point. The subsequent vote resoundingly rejected such objection.⁶¹

Nevertheless, the Government says that "even if an entire river system is in fact involved"⁶² we do not have a general adjudication because the necessary parties were not before the court at the time of the attempted joinder. The Colorado Supreme Court found no difficulty in holding this to be a general adjudication within the meaning of *Dugan v. Rank*, 372 U.S. 609, 618, because proceedings such as involved in this case met the tests therein prescribed, *i.e.*, this is a public, not a private suit; all claimants are parties; relief is granted as between claimants; and priorities are established. Under Colorado law the adjudication proceedings are "general" whether an original action within a water district or one supplementary thereto. Such actions are in the nature of *in rem* proceedings, and, in

⁶⁰ S. Rep. No. 755, 82d Cong., 1st Sess. 2 (1951), quoted at 17 *supra*.

⁶¹ 98 Cong. Rec. 9445 (1952); see pp. 28-29 *supra*.

⁶² Brief 30. Though strenuously argued below, the Government's point on the alleged lack of "an entire river system" seems now to have merged with their alleged lack of necessary parties, and indeed to have been submerged by that claim.

the instant case, all statutory notice requirements were complied with.⁶³ Upon such compliance the court acquired jurisdiction of all persons using or claiming the right to use waters of the Eagle River and its tributaries.

The Government now urges that since it would, if otherwise properly a party, claim rights antedating in priority the rights of others already in decree, the owners of those rights are necessary parties before the United States can properly be joined. The Government asserts this despite the fact it has not actually filed such claims, without which the need for and the identity of such parties cannot be determined. Furthermore, this assertion is made despite the fact the court below said appropriate notice could be given upon the filing of such claims.⁶⁴ Additional parties are

⁶³ Colo. Rev. Stat. 148-9-7, as amended (1963), reads in part as follows:

A supplemental adjudication shall be initiated in the same manner as provided in this article for the initiation of original adjudications except that the petition for a supplemental adjudication shall contain a proper averment referring to the original adjudication . . . The notice shall be given and served in the same manner as in the case of an original adjudication.

Notice in original suits is provided for in Colo. Rev. Stat. 148-9-5, as amended (1963). Service is required to be made by mail on all persons (named in a list certified by the irrigation division engineer) who diverted water in the District in the preceding calendar year as well as on all persons having filed maps and statements in the office of the State Engineer. Additionally, publication of the notice is made for four weeks (five insertions) in one public newspaper in each county into which the water district extends. All water users are thus advised of the pendency of the proceedings and of their right to appear and object to any claim therein made.

⁶⁴ A. 43. In addition, Colo. R. Civ. P. R. 19(a), as amended (1963), requires joinder of all persons in the situation so presented.

necessitated, if at all, not by joinder of the United States but by the claim or claims it makes.

The purpose of Section 666 was to authorize the joinder of the United States as one of the parties defendant in a proceeding such as involved in this case. When service was accomplished as provided in Section 666 the joinder was complete,⁶⁵ and for the first time a truly general adjudication of rights to the use of water of the Eagle River and its tributaries was made possible.

CONCLUSION

The respondent court and the court below found this proceeding, instituted in 1967, to be one "for the adjudication of rights to the use of water of a river system or other source" to which the Congress had given consent to join the United States. The ruling below that jurisdiction had been properly obtained over *all* of the claims of the United States is overwhelmingly supported by the legislative history, developed over three years of consideration of the subject by the Congress. The need for certainty in waters rights adjudications, totally lacking where the United States if a necessary party is not in the proceeding, was intended to be accomplished by the action the Congress took. This is all that has been decided below, and we urge that this decision be affirmed to the end that the Congress-

⁶⁵ No objection was ever entered to the method in which joinder was accomplished.

sional purpose of bringing certainty and stability in this field may be fulfilled.

Respectfully submitted,

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July 15, 1970

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S. 2305

IN THE SENATE OF THE UNITED STATES

JULY 21 (legislative day, JUNE 2), 1949

Mr. McCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That consent is hereby given to join the United States as
4 a defendant in any suit for the adjudication of rights to the
5 use of water of a river system or other source or for the
6 administration of such rights where it appears that the
7 United States is the owner or is in the process of acquiring
8 water rights by appropriation under State law, by purchase,
9 exchange, or otherwise and that the United States is a
10 necessary party to such suit: *Provided*, That the United
11 States shall have the right of removal to the Federal court

- 1 of any such suit in which it is a party: *Provided further,*
2 That no judgment for costs shall be entered against the
3 United States in any such suit. Summons or other process
4 in any such suit shall be served upon the Attorney General
5 or his designated representative.

A BILL

To authorize suits against the United States to
adjudicate and administer water rights.

By Mr. McCARRAN

JULY 21 (legislative day, JUNE 2), 1949

Read twice and referred to the Committee on the
Judiciary

82nd CONGRESS
1st SESSION

S. 18

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 1951

Mr. McCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That consent is hereby given to join the United States as
4 a defendant in any suit for the adjudication of rights to the
5 use of water of a river system or other source or for the
6 administration of such rights where it appears that the
7 United States is the owner or is in the process of acquiring
8 water rights by appropriation under State law, by purchase,
9 exchange, or otherwise and that the United States is a
10 necessary party to such suit: *Provided*, That the United
11 States shall have the right of removal to the Federal court

- 1 of any such suit in which it is a party: *Provided further,*
2 That no judgment for costs shall be entered against the
3 United States in any such suit. Summons or other process
4 in any such suit shall be served upon the Attorney General
5 or his designated representative.

H. R. 10000
1st Session

S. 18

A BILL

To authorize suits against the United States to
adjudicate and administer water rights.

By Mr. McCARRAN

JANUARY 8, 1951

Read twice and referred to the Committee on the
Judiciary

EXHIBIT 3
Calendar No. 71182d CONGRESS
1st Session

S. 18

[Report No. 755]

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 1951

Mr. McCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 17 (legislative day, SEPTEMBER 13), 1951

Reported by Mr. McCARRAN, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That consent is hereby given to join the United States as
4 a defendant in any suit for the adjudication of rights to the
5 use of water of a river system or other source or for the
6 administration of such rights where it appears that the
7 United States is the owner or is in the process of acquiring
8 water rights by appropriation under State law, by purchase,
9 exchange, or otherwise and that the United States is a
10 necessary party to such suit: *Provided, That the United*
11 *States shall have the right of removal to the Federal court*

1 of any such suit in which it is a party: *Provided further,*
2 *Provided, That nothing in this Act shall be construed as*
3 *authorizing the joinder of the United States in any suit or*
4 *controversy in the Supreme Court of the United States in-*
5 *volving the right of States to the use of the water of any*
6 *interstate stream. When the United States shall be a party*
7 *to any such suit it shall be deemed to have waived any right*
8 *to plead that the State laws are not applicable, or that the*
9 *United States is not amenable thereto, by reason of the*
10 *sovereignty of the United States, and the United States shall*
11 *be subject to the judgments, orders, and decrees of the court*
12 *having jurisdiction, and may obtain review thereof, in the*
13 *same manner and to the same extent as a private individual*
14 *under like circumstances: Provided, That no judgment for*
15 *costs shall be entered against the United States in any such*
16 *suit. Summons or other process in any such suit shall be*
17 *served upon the Attorney General or his designated*
18 *representative.*

19 *SEC. 2. The head of every department or agency of the*
20 *United States and of every corporation which is wholly*
21 *owned by the United States shall, within two years from the*
22 *effective date of this Act, cause to be filed with the Secretary*
23 *of the Interior, in such form and detail as he shall prescribe, a*
24 *complete list of all claims of right to the use by that depart-*
25 *ment, agency, or corporation of the waters of any stream or*

1 other body of surface water in the United States for agri-
2 cultural, silvicultural, horticultural, stock-water, municipal,
3 domestic, industrial, mining, or military purposes, or the pro-
4 tection, cultivation, and propagation of fish and wildlife, or
5 any other purpose involving a consumptive use of water, or
6 for the production of hydroelectric or other power or energy.
7 Said list shall be supplemented and revised promptly as new
8 claims of right are made and existing claims are abandoned
9 or otherwise disposed of. A catalog of such claims shall be
10 maintained by the Secretary and, except for items therein
11 which are certified by the head of the claimant department,
12 agency, or corporation to be of such importance to the na-
13 tional defense as to require secrecy, shall be open to inspection
14 by the public and, subject to the same exception, copies thereof
15 and of items therein shall be furnished by the Secretary upon
16 payment of the cost thereof. The Secretary may make rules
17 and regulations to carry out the purpose of this section.

82nd CONGRESS
1st Session

S. 18

[Report No. 755]

A BILL

To authorize suits against the United States to
adjudicate and administer water rights.

By Mr. McCARRAN

JANUARY 8, 1951

Read twice and referred to the Committee on the
Judiciary

SEPTEMBER 17 (legislative day, SEPTEMBER 13), 1951

Reported with amendments

Calendar No. 711

82ND CONGRESS }
2ND Session }

SENATE

{ REPT. 755
Part 2AUTHORIZING SUITS AGAINST THE UNITED STATES TO
ADJUDICATE AND ADMINISTER WATER RIGHTS

APRIL 2, 1952.—Ordered to be printed

Mr. McCARRAN, from the Committee on the Judiciary, submitted the
following

REPORT

[To accompany an amendment to S. 18 as reported]

Strike out section 1 as proposed to be amended beginning on page 1, line 3 down to and including line 18 on page 2 and insert in lieu thereof the following:

"That consent is hereby given to join the United States as a defendant in any suit, (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

PURPOSE

The purpose of the proposed amendment is to clarify the first committee amendment to S. 18 as reported by the Committee on the Judiciary on September 17, 1951.

STATEMENT

It has come to the attention of the committee that there is a possible ambiguity in the language of section 1 of S. 18 as reported by the committee. The ambiguity consists in the following: The first sentence of the first proviso of section 1 is as follows:

Provided, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

The second sentence of said first proviso is as follows:

When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

It has been stated that the second sentence of the proviso may refer back to the first sentence and be restricted to suits of that category rather than to the first part of the section which authorizes the joining of the United States as a defendant in any suit as to the adjudication of rights to the water. While the committee does not believe that such is the case, in order to make the matter extremely clear the above amendment is offered.

It has been noted that the amendment to section 1 is in somewhat different form than section 1 appears at the present time, but it was felt that in order to convey a clearer meaning the form now submitted is better. The committee believes and is of the opinion that this amendment does not in any way change the effect of section 1 as reported but simply rearranges the language thereof so as to make the intent thereof clear and unmistakable.

82^d CONGRESS
1st SESSION

H. R. 5735

FILE COPY ONLY
DO NOT REMOVE

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1951

Mr. ENGLE introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

Title amended: See House Report No. 1452, 2/29/52

A BILL

To require all Federal officers in carrying out laws relating to water-resources development and utilization to comply with the laws of the affected States or Territories.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That all Federal officers in carrying out the laws relating to
4 water-resources development and utilization, including the
5 furnishing of water to national-defense installations, in States
6 or Territories, lying wholly or partly west of the ninety-
7 eighth meridian, shall proceed in conformity with the laws
8 of such States or Territories with regard to the control.
9 appropriation, use, or distribution of water and shall not
10 interfere with or acquire any vested right except upon specific

- 1 authorization and upon due compensation being paid therefor.
- 2 The provisions of this Act shall not be construed as affecting
- 3 or intended to affect in any manner whatsoever the provisions
- 4 of section 8, Reclamation Act, 1902.

SEN. CONGRESS
1ST SESSION

H. R. 5735

A BILL

To require all Federal officers in carrying out laws relating to water-resources development and utilization to comply with the laws of the affected States or Territories.

By Mr. ENGLE

OCTOBER 16, 1971

Referred to the Committee on Interior and Insular
Affairs

82^d CONGRESS
2^d SESSION

H. R. 7691

FILE COPY ONLY
DO NOT INDEX

IN THE HOUSE OF REPRESENTATIVES

MAY 1, 1952

Mr. BUDGE introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

A BILL

To require Federal officers, agencies, and employees to act in accordance with and submit to the laws of the several States relative to the control, appropriation, use, and distribution of water and providing that the United States shall sue and be sued in the courts of such States in litigation arising therefrom.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That all Federal officers, agencies, and employees in carrying
4 out Federal law relating to water-resources development and
5 utilization, including but not limited to the delivery of water
6 to national defense installations, and to federally owned areas
7 for other purposes, shall act in accordance with the same

MAY 1 1952

1 procedures as provided by the laws of the several States for
2 the control, appropriation, use, and distribution of water by
3 private persons, and no other procedure shall be hereafter
4 instituted or continued. Federal officers, agencies, or em-
5 ployees in developing or acquiring water or water rights
6 pursuant to Federal law shall not interfere with any right
7 recognized by local custom or law except when authorized
8 to do so and upon payment of just compensation therefor:
9 *Provided*, Federal officers, agencies, or employees may
10 acquire such rights by gift, exchange, or donation. The
11 provision of this Act shall not be construed as repealing or
12 affecting any of the provisions of section 8, Reclamation Act,
13 1902, but shall be construed as being supplementary thereto.

14 SEC. 2. All Federal officers, agencies, and employees
15 are authorized and directed to submit to the jurisdiction of
16 the appropriate judicial and administrative agencies and
17 tribunals of the several States in matters concerning the ac-
18 quisition, determination, and exercise of rights to the use of
19 water or the administration of such rights.

20 SEC. 3. The United States shall sue and be sued in the
21 State courts in all matters pertaining to the acquisition, de-
22 termination or exercise of rights to the diversion and use of
23 water, and such suits shall not be removed to a Federal court
24 upon petition of the United States. In such suit no judg-
25 ment for costs shall be entered against the United States.

1 Process in such suit may be served on the Attorney General
2 of the United States or on the United States district attorney
3 for the district which embraces the area of jurisdiction out
4 of which the process issues.

5 SEC. 4. The procedures herein provided for shall apply
6 to proceedings for the acquisition, adjudication, abandon-
7 ment, change of point of diversion, and change of place of
8 use of water rights.

9 SEC. 5. Nothing in this Act authorizes or shall be con-
10 strued as authorizing the joinder of the United States in any
11 suit or controversy in the United States Supreme Court be-
12 tween two or more States involving the rights of a State to
13 the use of water of any interstate stream.

UNITED STATES, PETITIONER

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT
OF THE STATE OF COLORADO

AMICUS CURIAE BRIEF FOR THE STATES OF
COLORADO, OREGON, NEVADA, IDAHO, MONTANA
AND ALASKA IN SUPPORT OF THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

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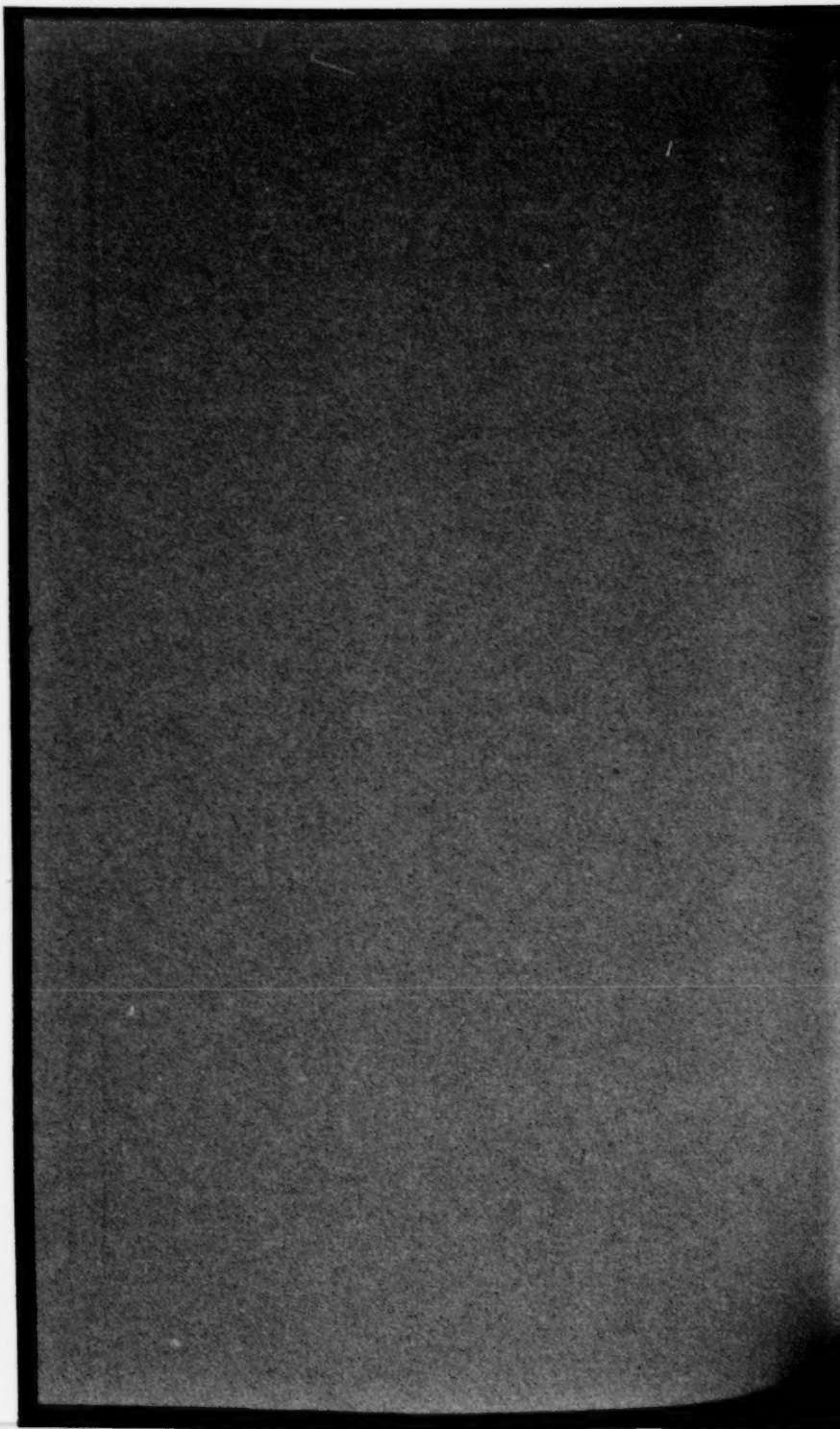
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1178

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO

*ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO*

AMICUS CURIAE BRIEF FOR THE STATES OF
COLORADO, OREGON, NEVADA, IDAHO, MONTANA
AND ALASKA IN SUPPORT OF THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

STATEMENT OF INTEREST

The aridity of climate and scarcity of water have always been limitations upon development of the West. In most areas, there just is not enough water to satisfy all of the demands. As the West grows and develops, the demands are continually expanding. Unfortunately, the available water supply remains fixed. Hence, the competition for water continually increases.

The true value of water is not measured by its physical possession. Its value is based upon the expectancy that a like amount will be available at a particular place, year after year. It was this desire for a stable

expectancy that led to the "first come, first served," or appropriative doctrine of water rights.

The appropriative doctrine, in one form or another, is followed in all nineteen Western States, including Alaska and Hawaii. Under it, a right to the use of water is initiated by an expression of desire, in proper form, of utilizing a given amount of water. This must be followed by a diligent effort leading to the actual beneficial use of the water. Priority of right dates from the initial expression of desire for use. In cases of insufficient water to supply all rights, those rights with the latest date of priority are denied water until all senior rights have been satisfied.

Various federal agencies have claimed that the reservation of land for various purposes also reserved sufficient water necessary to effectuate the purpose of the Reservation. The acceptance of such a theory of claims by the federal agencies would, on a fully utilized stream, create a situation wherein increased federal uses would deny water to users who had water rights with priorities established after the Reservation, but prior to the expanded use.

In the eleven Western States, the United States owns 45.7 percent of the land. Of a total area of approximately 760,000,000 acres, the United States owns some 350,000,000 acres. Included in that 350,000,000 acres are approximately 160,000,000 which were reserved between 1897 and 1903 for National Forest purposes. These are the high mountain lands that receive and

collect the winter snows for summer release. Runoff from these lands averages 200 million acre feet annually, or approximately 55 percent of the average annual runoff.¹

According to the same study, federal consumptive uses in 1967 in the eleven Western States totalled 2,255,836 acre feet. By 1980, those agencies estimate their consumptive use to increase to 2,472,269 acre feet. Their projected consumptive uses for the year 2000 would total 2,619,474 acre feet.²

Thus, according to their own conservative estimates, federal uses will increase approximately sixteen percent by the year 2000 in a region that is already notoriously water deficient. Such increases, if concentrated in already water short areas, could be disastrous to water users who had long been using that water, and had made vast developmental expenditures based upon a supply that did not include the expanded federal uses.

The States do not wish to deprive the Federal Government of valuable water rights. They know only too well that related land resources are much less valuable without the water necessary for their development. The States ask only an identification of the extent of the federal rights, so that existing uses might be protected and future developers, whether federal, state

¹ Wheatley, Corker, et al, 1 Study of the Development, Management and Use of Water Resources on the Public Lands. S-30 (1969)

² Id at 475, v II. See Appendix A.

or private, might better be able to predict the water supply available for further development.

The United States asserts that "43 U.S.C. does not consent to adjudications of the reserved water rights of the United States." To accept this theory would allow expansion of federal water uses from dwindling water supply at the expense of long-established water rights. Such a theory would subject the billions of dollars invested in water resource development in the Western States to the whim of federal administrators and transfer the future planning and development of western water resources completely out of the state and private sectors and into the Federal Government. It is to this single issue that the signatory states direct this Brief.³

Whether or not Water District 37 constitutes a "river system" as defined by 43 U.S.C. 666 is beyond the scope of this Brief.

Determination of the existence, nonexistence or the extent of "reserved rights" is not properly before this Court at this time. Determination of that issue should only come after the jurisdictional question has been answered and the Colorado Court has been allowed to adjudicate the Eagle River System. Then, and only then, is the proper time for this Court to review the validity of the Colorado Court's decision concerning the Reservation Rights.

³ See Appendix B for a compilation of state policy statements on the issue of the McCarran Amendment and state-federal relations in general.

QUESTION PRESENTED

Whether the United States, by reliance upon the anachronistic defense of sovereign immunity, should be allowed to avoid the identification of its claims to the use of water from reserved lands needed for the protection of existing rights and the establishment of the stability necessary for meaningful future planning of water resource development.

SUMMARY OF ARGUMENT

I

The United States should not be permitted by reliance upon the anachronistic doctrine of sovereign immunity to frustrate effective water rights adjudications. A vestige of the ancient fiction that a King can do no wrong, this doctrine has long been castigated by commentators and, more recently, has been rejected by the courts. It has no rational, moral or practical underpinnings which would justify its retention as a bar to proper determinations of water rights. Since the doctrine was judicially created, it can and should be repudiated by this Court.

II

The economic health of the arid and semi-arid West is crucially tied to the available water supply. Since there is not sufficient water to satisfy all demands, it is imperative that rights to water be determined and allocated in an orderly way. This can be accomplished only by means of proceedings adjudicating the rights

of *all* claimants to a single water source. Prior to the passage of the McCarran Amendment, effective determination of water rights was impossible because the United States refused adjudication of its rights. Federal water rights thus remained uncatalogued, leaving individual water rights intolerably confused and unstable. The McCarran Amendment, by authorizing joinder of the United States in adjudication procedures, was enacted to eliminate this evil.

Surprisingly, the government now urges this Court to construe the Amendment to preclude the adjudication of federal reserved water rights, thereby perpetuating the very instability the Act was designed to eliminate. Accordingly, this Court should reject this construction and interpret the Amendment so as to effectuate its purpose by allowing adjudication of all U.S. water rights. This can be accomplished by according the phrase "the owner of" general application or by refusing to delimit the scope of the phrase "or otherwise" to water rights acquired under state appropriation laws.

III

Much of the wealth of the Western United States has been built upon the stable foundation of a firm water supply obtainable under the appropriative doctrine of water rights. The states do not wish to take away precious water rights from the United States but rather to identify the extent and priorities of such rights, thus bringing stability into actual and antici-

pated water usage and development. They should be given the opportunity to try.

ARGUMENT

I

The United States Should Not Be Allowed, By Reliance Upon an Anachronistic Defense, to Frustrate Legitimate Adjudication Procedures.

The United States asserts that it can be joined as a party in the instant action only if the McCarran Amendment has explicitly waived the doctrine of sovereign immunity. That doctrine is an indefensible anachronism which has no logical, moral, or practical underpinning which would justify its continued retention in the area of water rights determination. Sovereign immunity harkens back to the days of monarchical privilege and the ancient fiction that the King could do no wrong. The doctrine's origin in this country cannot be found in the Constitution, in an interpretation of the Constitution, nor in any specific enactment of Congress. It is unquestionably judge-made. In one curious sense, the law of sovereign immunity was found and not made, for it developed not through conscious judicial creation, but through judicial assumption that it already existed.

In 1793, this Court explicitly left open the question of whether or not the government could be sued without its consent.¹ Nonetheless, the doctrine gradually developed into the case law. In 1882, this Court acknowledged that it had not directly considered the

¹ *Chisholm v. State of Georgia*, 2 U.S. (2 Dall.) 419, 461, 478 (1793)

principle of sovereign immunity and that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."²

The judges who created and molded the doctrine were often actuated by misunderstanding. Perhaps the outstanding example of a mistake was the unanimous pronouncement of this Court in 1868 that: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents."³ One eminent commentator has pointed out that the Court "overlooked the fact that practically every country of western Europe had long admitted such liability."⁴

Closer to the heart of the probable motivating reasons for the development of sovereign immunity is the misunderstanding exemplified by another statement of this Court in 1868: "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."⁵ Not only is this proposition not obvious,

² *United States v. Lee*, 106 U.S. 196, 207, 1 S. Ct. 240, 250, 27 L.Ed. 171 (1882).

³ *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274, 19 L.Ed. 453 (1868)

⁴ Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 2 (1934).

⁵ *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868).

but the opposite of this proposition is rapidly becoming obvious.

Noted commentators, after tracing the development of the doctrine in American law, have lamented:

Monarchical doctrines of Kings who can do no wrong and sovereigns above the law were developed and inflated in the United States to a point never reached in England, in which they had their roots, and never even deemed worthy of serious consideration in the feudal continent so often and so erroneously deemed the source of governmental irresponsibility. It was left for the democratic United States to furnish the rationalizations and unconvincing explanations which gave a misunderstood major premise the false appearance of a reasoned and logical conclusion.

But however unjustified the premise of sovereign irresponsibility, it has stood rather stubbornly, even if not impregably, in the way of statutory reform designed to overcome the injustice of these superannuated judicial doctrines.⁶

Within a political and social system such as exists in the United States, one would think that the touchstone for the legal relationship between the citizen and the state would not be that expressed by the term "sovereign immunity" but rather a generous theory of "public responsibility." . . . [S]overeign immunity means much more; its connotation is that of extensive public irresponsibility. Any theoretical support for the doctrine

⁶ Borchard, *State and Municipal Liability in Tort — Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934).

of sovereign immunity, in the broad sense of the term, has long ago been discarded; but the doctrine itself remains a stumbling block. Writing in 1959, one critic observed that "roots stretching out from ancient times have tripped twentieth century courts in their efforts to reach practical solutions needed in an age where state activities dominate society. . . . Timid legislators, weaving psychological straight-jackets have, except in haphazard instances, been similarly unwilling to act."

Thomas Jefferson said it better than anyone: "The care of human life and happiness is the first and only legitimate object of good government." Against such a standard, sovereign immunity has been and is a shibboleth that ought to be eliminated from legal and political vocabulary.*

The trend today is definitely away from sovereign immunity and towards sovereign responsibility. Although there have been legislative inroads into sovereign immunity [e.g., The Federal Tort Claims Act, the McCarran Amendment under consideration here], the most recent inroads have been made by the courts. Recognizing that the doctrine was judicially created, courageous courts have acted to abolish large chunks of immunity. This trend has gained considerable momentum since 1957, particularly in the area of government liability for tort. The states in which judicial action has been taken to eliminate large areas of im-

* McCord, *Sovereign Immunity and Public Responsibility*, University of Illinois Law Forum (Winter 1966) p. 793.

* Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, University of Illinois Law Forum (Winter 1966) p. 828.

munity, although some have waived, are, chronologically, Florida, Colorado, Illinois, New Jersey, California, Michigan, Wisconsin, Minnesota, Arizona, Nevada, and Washington. In addition, the District of Columbia has also abolished the immunity. While the specific holdings of these cases are not relevant to the case at bar, the pervasive judicial distaste for and repudiation of sovereign immunity is. Many of these cases are collected in Appendix C and highlight three major points: (1) The doctrine of sovereign immunity is an anachronism without rational or moral justification; (2) The doctrine was introduced into American jurisprudence by the courts; and (3) Therefore, the courts can and should eliminate the doctrine.

Although this Court continues to give lip service to the doctrine of sovereign immunity by using it as grounds for dismissal of actions against the United States, in many cases it has effectively, if not formally, rejected the doctrine and sustained jurisdiction. In order to do so, the Court has had to indulge in a fiction — i.e., that a suit against a governmental officer is not a suit against the government (even though all concerned are fully aware that it is). Confusion has often developed because the Court has sometimes dismissed a suit against the government officer because it was really a suit against the government, and sometimes allowed the suit on the fiction that the suit is against the officer. This confusion has produced a series of Supreme Court decisions which this Court acknowledges to be difficult to reconcile.⁹

⁹ *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947).

In 1963, this Court decided two companion cases arising out of the water problems of California's Central Valley — *Dugan v. Rank*¹⁰ and *City of Fresno v. California*.¹¹ The *Dugan* suit was an injunction against local officials of the United States and against the United States to prevent diversion of water. The Court held that the United States had not given consent to the suit and that the action against the officers was against the United States. Diversion of the water was not a trespass but "a partial taking of respondent's claimed rights." Since the statute authorized that acquisition by "eminent domain or otherwise," the water rights of the plaintiffs were "subject to seizure."

This Court rejected the claim that the McCarran Act authorized joinder of the United States because the proceedings were not a "general adjudication of water rights." Thus construed under the *Dugan* opinion, sovereign immunity prevents owners from enjoining government officers from taking their property if the officers are (1) acting within their statutory authority and (2) their action is constitutional. This Court also held that (1) the statute authorized the fiscal seizure of the property rights in the water and (2) such seizure is constitutional so long as the Tucker Act allows a suit for damages.

The *Fresno* case was brought by the City against the State, local officers of the United States and the United States. The suit differed from the *Dugan* suit in that a declaration as well as an injunction was sought. The Court held that the opinion in *Dugan* controlled the

¹⁰ 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963)

¹¹ 372 U.S. 627, 83 S. Ct. 996, 10 L.Ed. 2d 28 (1963)

decision. The Court had stated in *Dugan* what it called "the general rule." That statement is a misleading summary of what the Court does and will do. After quoting first from *Land* and then from *Larson v. Domestic and Foreign Commerce Corporation*¹², the Court then declared:

The general rule is that a suit is against the sovereign if the judgment sought would expend itself upon the public treasury or domain, or interfere with the public administration, . . . or if the effect of the judgment would be 'to restrain the government from acting or compel it to act.'¹³

This asserted general rule has never been the general rule. Judgments of this Court have often "expended themselves on the public treasury or domain,"¹⁴ have often "interfered with the public administration,"¹⁵

¹² *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

¹³ 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963).

¹⁴ In *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), this Court upheld a writ of ejectment against government officers who held possession of land on behalf of the government. The effect of the Court's order was to oust the government from land. The judgment expended itself on what the government claimed to be the public domain. The government was restrained from staying, and was compelled to get off.

¹⁵ In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959), the question was "the validity of the government's revocation of security clearance granted to the petitioner, an aeronautical engineer employed by a private manufacturer which produced goods for the armed services." The Court issued a declaratory judgment that the government's revocation of the security clearance was unlawful. The effect of the declaration was to "interfere with the public administration" and "compel the government to act" to withdraw the revocation.

and have often "restrained the government from acting or compelled it to act."¹⁶

Kenneth Culp Davis summarized what is happening "in our strange system" in the following language:

When you sue the government for specific relief or for a declaratory judgment, you must falsely pretend (in the absence of a special statute) that the suit is not against the government but that it is against an officer. You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know that the relief is against the sovereign. Even when the substance of sovereign immunity is gone, the form usually remains. The courts do not violate the doctrine of sovereign immunity except in substance.

* * *

The transition stage during which the courts

¹⁶ In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed. 2d 639, (1962), this Court reversed a denial of injunctive relief against the Post Office Department's refusal to carry certain mail. The effect was to compel the United States to carry the particular mail. The Court's decree "interfered with the public administration," and "compelled the government to act." In *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed. 2d 1012 (1959), the Court ordered the Secretary of the Interior to reinstate a federal employee to his government position. Surely in every realistic sense the Court's judgment "expended itself against the government," and "compelled the government to act." The Court's judgment required the government to take the employee back, to allow him to work as a government employee, and to pay him his salary.

are in the process of unmaking the judicially made law of sovereign immunity, causes the judges to grant relief against the sovereign but to deny that they can grant relief against the sovereign. They can do justice but they have to pretend that sovereign immunity prevents them from doing justice. They must hide the truth. Judge X hides the truth from Judge Y who hides the truth from Judge Z, who hides the truth from Judge X. The litigants hide the truth from the judges, and the judges hide the truth from the litigants.

The time is surely approaching, perhaps the time has come, for relinquishing the false pretenses. The courts are allowing the doctrine of sovereign immunity to be violated in substance, and the time is coming, perhaps soon, when the forms of sovereign immunity will seem useless.¹⁷

This Court has also acknowledged and responded to the growing disfavor of the sovereign immunity defense. In the case of *National City Bank of New York v. Republic of China*,¹⁸ this Court observed:

But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady drift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as "Public opinion as

¹⁷ Davis, *Administrative Law Treatise* Vol. 3 (1965 Pocket Supplement) pp. 151-152.

¹⁸ 348 U.S. 356, 359, 75 S.Ct. 423, 426, 99 L.Ed. 389 (1955).

to the peculiar rights and preferences due to the sovereign has changed," *Davis v. Pringle*, 268 U.S. 315, 318; "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . ." *White v. Mechanics Securities Corp.*, 269 U.S. 283, 301; ". . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . .", *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797. At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due from the sovereign. And because of the objections to *ad hoc* legislation allowances of private causes, Congress a hundred years ago created the Court of Claims, where the United States, like any other obligor, may affirmatively be held to its undertakings. This amenability to suit has become as commonplace in regard to the various agencies which carry out "the enlarged scope of government in economic affairs," *Keifer & Keifer v. Reconstruction Finance Corp.*, *supra*, at 390. The substantive sweep of amenability to judicial process has likewise grown apace.

The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping forces in law-making by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy properly makes demands on the judicial process.

This Court's acknowledgement that its decisions in this area cannot be reconciled gives the Court an opportunity, indeed a duty, to clarify the law in a sound manner. To do so the Court need not break new ground. It needs only to adhere to the simple and sound observation it made in 1882: "Courts of Justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights and controversy between them and the government."¹⁹

II

The McCarran Amendment Was Enacted to Allow Joinder of All Water Users in Proper Adjudication Procedures.

Under the laws of the Western States, procedures exist whereby water users or state officials can initiate judicial proceedings to obtain a determination of the respective water rights of water users on a particular river or other water system. Due to the priority concept of the appropriation doctrine, if any such general adjudication of water rights is to be effective, it is imperative that *all* water users from a single source of supply be joined in the action and bound by the results.

Unfortunately, prior to the enactment of the McCarran Amendment,²⁰ this was not possible. The United States, because of sovereign immunity, could not be joined in such adjudications. Since the United

¹⁹ *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 261, 27 L.Ed. 171 (1882).

²⁰ The McCarran Amendment (43 U.S.C. 666, Act of July 10, 1952, 66 Stat. 560), construction of which is at issue here, provides in pertinent part: "Suits for adjudication of water

States claims the right to initiate unknown, uncatalogued and undetermined future uses on National Forest lands under priority dates ranging from 1897 to 1903, other water users had no assurance or security that their current water supply would remain intact. This left the predictability of future water supplies in an unstable and intolerably confused state. In addition to potential deprivation of existing users, possible developers refused to make the substantial investments necessary to beneficially utilize water resources for fear of losing their water rights as a result of the Federal Government subsequently asserting claims to the water.

The legislative history of the McCarran Amendment clearly indicates that it was enacted because of this problem and to allow effective determination of all

rights. (a) Joinder of United States as defendant; costs. Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit shall (1) be deemed to waive any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, that no judgment for costs shall be entered against the United States in any such suit."

water rights. In its report, the Senate Judiciary Committee states:²¹

In the administration of and the adjudication of water rights under state laws, the state courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, *and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.* Accordingly all water users on the stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a state court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts.

The absolute necessity of joining the United States to achieve effective adjudication of water rights was reiterated later in the report:²²

Since it is clear that the states have the control of the water in their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper ad-

²¹ (See Senate Calendar No. 711, Report No. 755, September 17, 1951 quoted in Vol. 98, Part I, Congressional Record — Senate, 82nd Cong. 2d Sess., pp. 120-122, January 14, 1952)

²² *Ibid.*

ministration of the water law as it has developed over the years. . . .

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the court in the same manner as if it were a private individual.

In discussion of the Act on the Senate floor, Senator Arthur V. Watkins, (Utah), who was subsequently designated as a co-sponsor of the measure, illustrated the bill's purpose:²⁵

Senator Watkins. I would like to give you one illustration, which illustrates very well what we are trying to do.

The Jordan drainage area in Utah has, with the United States acting as a trustee for one of the great reclamation projects and holding title to a certain amount of water out of the stream, a suit to determine the rights of all the water users on that stream now in court. The only one that is not in there is the United States as trustee, and we cannot get them into court because we do not have a bill such as S.18 passed.

The United States has not consented to come in and be sued. How are we going to determine those rights? We would like to get the matter settled.

In that particular case, the United States owns property along the stream, yet we cannot get our

²⁵ Vol. 98 Part Three, Congressional Record — Senate, 82nd Cong. 2d Sess., p. 3042.

rights determined because we cannot get into court.

Now, that is what we would like to be able to do out in the West.

Finally, the Department of Interior acknowledged that:²⁴

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of the *United States v. Winters* (207 U.S. 546 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under [a series of specified acts]; those with respect to which its officers and employees have followed the procedure prescribed in Section 8 of the Act of June 17, 1902 (32 Statutes 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation by private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all of these types, it is clear to me

²⁴ Letter from Mastin G. White, Acting Assistant Secretary of the Interior, to Pat McCarran, Chairman of the Committee on the Judiciary, Aug. 3, 1951.

that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

These observations concerning the scope of the Bill were not denied, nor were any changes made in the statutory language in response to them.

In summary, it seems indisputable that the purpose of the McCarran Amendment was to make possible an effective determination of all water rights from a single source of supply. Under any other interpretation, the probability remains that any decree determining priorities and extent of rights will be overturned. This instability in water rights adjudication was the very evil the measure was designed to eliminate.

The United States urges this Court to construe the McCarran Amendment to preclude proper adjudication of all water rights. It argues that the prepositional phrases referring to modes of acquisition — that is, (a) “by appropriation under state law,” (b) “by purchase,” (c) “by exchange,” and (d) “or otherwise,” — modify and qualify the phrase “the owner of.” So construed, federal ownership alone is not sufficient ground to justify joinder of the United States in a water adjudication suit. Rather, on this view, the United States may be joined only if it acquired the pertinent water rights by one of the specified modes

of acquisition. They claim that reserved water rights have not been acquired by means of "appropriation," "purchase" or "exchange," which are modes of acquisition under state law, and that the rule of *ejusdem generis* limits the denotation of "or otherwise" only to other means of acquisition under state law. Inasmuch as reserved water rights are not acquired pursuant to state laws, the government argues, the Act does not authorize joinder of the United States in water rights adjudications concerning reserved rights. Whatever technical merits this interpretation may have, it is clearly erroneous. Such an interpretation frustrates the stated purpose of the McCarran Amendment, perpetuating the very evil it was designed to correct.

The statutory language is susceptible of a different, more reasonable interpretation which implements the purposes of the Act. The phrase "the owner of" should be accorded general application and *not* be qualified by the phrases referring to the specified modes of acquisition.

Thus construed, the statute would be read as follows:

Consent is given to join the United States as a defendant in any suit where it appears that the United States [1] is the owner of [water rights] or [2] is in the process of acquiring water rights by [a] appropriations under state law, [b] by purchase, [c], by exchange, or [d] or otherwise.

This interpretation is supported by the doctrine of the "last antecedent" which holds that relative and

qualifying words, phrases, and clauses are to be applied to the words or phrase *immediately* preceding, and are not to be construed as extending to or including others more remote." Under this rule, phrases [a], [b], [c], and [d] are applied only to the immediately preceding phrase: "is in the process of acquiring water rights" and *not* to the more remote phrase "the owner of." This interpretation would allow joinder of the United States in water rights adjudication on the basis of ownership alone regardless of the source of that ownership.

The same result can be achieved by rejecting the government's application of the rule of *ejusdem generis* to the phrase "or otherwise." The government's argument that this phrase must be limited to modes of water rights acquisition under state law is not well founded in that "purchase" and "exchange" are *not* peculiarly modes of acquisition *under state law* as is appropriation. In fact, the United States has previously claimed that "when the United States acquired ownership of the public domain by cession from foreign sovereigns, it acquired the rights to use waters thereon within the bundle of rights which ownership of the lands involves."²⁵ For the most part, those "cessions"

²⁵ 82 C.J.S., Statutes, 334.

²⁶ Nicholas de B. Katzenbach, Deputy Attorney General, "Memorandum re: S.1275," Hearings before the Subcommittee on Irrigation and Reclamation of the Interior and Insular Affairs, U.S. Senate, on S.1275, p. 11 (1964). cf., *Brief for the United States* 20. The validity of this claim is strongly disputed by the States, but is not before the Court at this time. See p., *supra*.

upon which the reserved rights are based were "purchases." Surely, if the United States were to "exchange" public lands for lands on an Indian reservation, it would not relinquish whatever water rights those Indian lands might have. In neither example were the rights in question acquired "under state law."

To accept the interpretation of the United States would render the phrases "by purchase" and "by exchange" meaningless, inasmuch as, according to the United States, these terms are included in "by appropriation under state law." Such a construction would violate the presumption that the legislature intends that each word in a statute should have some meaning all its own, and is included in the statute for a particular purpose. Thus, it seems more reasonable that [a], [b], and [c] be construed as members of the general class of modes of water rights acquisition with [d] "or otherwise" serving to complete or exhaust that class. So construed, the Act would extend to adjudication of all types of federal water rights.

It seems apparent that the language in question is amenable to more than one interpretation and hence must be given that which will best effect its purpose rather than one which would defeat it.²⁷ As this Court has often held in construing a statute, to give effect to the intent or purpose of the legislature, the Court must look to the object to be accomplished and/or the evil or

²⁷ *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787, rehearing denied 335 U.S. 835, 69 S.Ct. 9, 93 L.Ed. 388.

mischief sought to be remedied.²⁸ The McCarran Amendment was enacted to allow an effective determination of water rights and to eliminate uncertainty and confusion as to the existence and extent of one's water rights.

The anomalous consequences of the government's construction of the Act focus attention on a fundamental inconsistency in the government's position. On the one hand, the government resists the jurisdiction of the Colorado District Court on the grounds that the action is not a *general* adjudication of *all* purported water rights on an entire river system. The United States, it urges, may not be subjected to piecemeal litigation in the resolution of its water rights. But in the next breath, the government argues that the McCarran Amendment should be construed to allow determination of only federal appropriative rights and not federal reserved rights, thus precluding the possibility of a completely general adjudication.

III

Adherence to the Appropriative Doctrine of Water Rights Forms the Basis for the Economic Stability of the West.

Submission of federal uses of water on reserved lands to the jurisdiction of state courts would not

²⁸ *U.S. v. Bryan*, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884, rehearing denied 339 U.S. 991, 70 S.Ct. 1018, 94 L.Ed. 1391. In ascertaining the intent and purpose, the court must look to the purpose to be subserved by the statute and should place such construction as will, if possible, effect the purpose of the statute. (*U.S. v. Cooper Corporation*, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071).

"frustrate" "the purposes for which millions of acres of lands have been withdrawn from the public domain," or make the "reserved rights of the United States . . . vulnerable to the vagaries of inconsistent state laws."

The water laws of the various Western States are not "vague" or "inconsistent." While there may be minor differences in some of the states, much of the law is now statutory, and is fairly uniformly construed. All the Western States, either by constitution, statute, or judicial pronouncement, adhere to the tenet of "beneficial use," which is the limit and measure of the right.

As Mr. Justice Douglas stated, the doctrine is "as important to these Western States as the doctrine of seizin has been to the development of Anglo-American property law."²⁹

Frank J. Trelease, Dean of the Wyoming Law School, aptly described the appropriative doctrine in this manner:³⁰

Upon it much of the wealth of the West has been built. Mining was its origin, irrigation has been its mainstay, but appropriations are made for all beneficial purposes: domestic and municipal, manufacturing and power production, stock raising and public recreation.

²⁹ *Arizona v. California*, 373 U.S. 546, 629 (1963)

³⁰ Trelease, *Arizona v. California, Allocation of Water Resources to People, States and Nation*, The Supreme Court Review, 1963) p. 158.

Several features combine to make an appropriation a property right of a high order. An appropriation is always defined in terms of the right to take a specific quantity of water. This, coupled with the element of priority, gives the western appropriators right a unique stability. On a typical western stream where there are many irrigators with water rights initiated at different times, all may draw water while the mountain snowpacks melt and the stream is high. As the stream flow decreases during the dry summer, the diversion works of appropriators are shut off in inverse order of priority. The burden of shortage thus falls on those with the later rights; there is no ration in times of scarcity. Some observers have questioned the desirability of this rule. Yet in its unique fashion it has led to maximization of benefits. The westerners early saw that an equal share of water that was insufficient for all might lead to parceling out the waters in shares that were sufficient for none. The rule of priority is not as harsh as it sounds. It guarantees a firm supply to all those for whom the supply is sufficient, and these people have been able to build an agriculture unmatched in stability in places where dependence is placed on natural rainfall. The junior appropriator is encouraged by this law to develop water resources. Instead of competing for a share of the available riparian system, the later users are forced to spend money to develop water from alternate sources. When senior appropriators had taken all of the dependable flow of western streams, further development was inaugurated by juniors who built dams to store spring floods, built larger dams that would store the supply of good years against future droughts, or brought water

long distances across or through mountain ranges from basins where the supply exceeded the local demands. The junior appropriator who does face a risk of shortage is like a farmer in a sub-humid area who must take his chances on rain. The value of his enterprise and the worthwhileness of venturing into it will depend upon the forecast he can make of receiving a supply. If the risk is great, he may use the land almost as dry land, so that water, when it comes, is a bonus. The senior appropriator with a firm water right may grow an orchard; the junior would not risk so substantial an investment in time and money. He might gamble on the loss of an annual crop but not of a permanent investment.

So long as potential federal developers can retain the priority date of the original federal reservation without identifying the amounts needed to effectuate the original purposes of the reservation, the necessary accuracy in appraisal of water supply is not possible.³¹ The resulting uncertainty stymies state and private development and bars optimum utilization of the West's most precious resources.

³¹ A revealing instance of the kind of problems that have been generated and aggravated by the government's position concerns the proposed Pine Hollow Reservoir Project in Oregon. In a letter to the Regional Director, Bureau of Outdoor Recreation, Seattle, Washington, under the date of October 24, 1968, from Leon Jourolmon, Assistant Regional Solicitor, the following was stated: "The Pine Hollow Cooperative, Inc., is planning to build the Pine Hollow Reservoir on land roughly three-fourths of a mile outside the boundaries of the Mount Hood National Forest. The reservoir impoundment will involve largely waters which arise on or flow from the lands in the Mount Hood National Forest. As you may be

The Western States do not wish to "destroy" the productivity of the millions of acres of reserved lands. They only wish to be afforded a procedure by which those rights can be identified. Their good faith is exemplified in a Position Paper submitted to the Public Land Law Review Commission in which they unanimously urged that Commission to recommend legislation which requires the United States:

to identify all Federal claims to surface and underground water asserted under the Reservation Doctrine or other theory of paramount right including those made on behalf of Indians. Such

aware, the Federal Government may assert its federally derived right to the use of water on federal lands by reference to Supreme Court decisions holding that waters traversing or bounding a reservation are reserved by the legislation or executive order establishing the reservation or withdrawal of public land. [Citing cases] Thus there is a serious question present as to whether or not Pine Hollow Cooperative, Inc., will be able to appropriate under Oregon State Water Law Procedures any water rights which can be regarded as binding upon the United States with respect to the waters flowing out of the Mount Hood National Forest. It is my opinion that the Cooperative will not be able to secure water rights under its application to the Oregon State Engineer for the 1,200 acre foot minimum sump together with the additional capacity of 3,500 acre feet for irrigation purposes together with 15 CFS out of Badger Creek for filling and maintenance, which rights can be regarded as valid and binding upon the United States as to the water flowing out of the Mount Hood National Forest. In these circumstances, it is also my opinion that the Cooperative will not be able to assign to the Oregon State Game Commission the rights to the 1,200 acre foot sump that can be regarded as free from doubt as to warrant assistance to the proposed participant of funds from the L&WCF for this project."

identification should include a specific recital of the purpose, location, extent and priority date of every water right claimed. The United States should be required to complete such identification within a reasonable, specified period of time and should be required to give notice to each affected state. The legislation should limit such claims to the effectuation of the original purpose of the reservation.

There is nothing in the present law or prior appropriation that would preclude a state court from reaching the same reasonable result. They should at least be given a chance to try.

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted:

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APPENDIX A
WATER USES ON PUBLIC LANDS*
(in acre feet)

	LIVESTOCK			BIG GAME			RECREATION		
	1967	1980	2000	1967	1980	2000	1967	1980	2000
BLM	12,450	18,411	25,546	1,222	1,370	1,674	169	242	
Forest Serv. ..	69,752	96,531	125,061	20,769	23,696	24,387	49,909	35,751	72,911
Nat'l. Park									
Service	330	297	249	98	98	98	1,029	3,560	5,330
Fish &									
Wildlife	568	578	611	69	72	76	45	116	130
USBR	277	290	310	29	33	30	278	790	1,300
AEC.....									
NASA.....									
ARS	404	517	427						
Army.....									
Air Force.....									
Navy.....									
Corps of Eng...							5,922	17,292	26,500
	83,781	116,624	152,204	22,187	25,269	26,265	57,352	57,751	106,611

*Compiled from information supplied by the various federal agencies to the Public Land Law Review Commission and utilized by Thomas M. Stetson, and Daniel J. Reid in their "Study of the Development, Management, and Use of Water Resources on the Public Lands," prepared for that Commission.

	LAND OCCUPANCY			OTHER			TOTAL		
	1967	1980	2000	1967	1980	2000	1967	1980	2000
							13,814	20,023	27,220
72,911	20,955	26,376	32,090	17,466	18,435	26,017	178,851	200,789	280,468
5,328	447	1,049	1,576	426	686	1,032	2,330	5,690	8,294
18	17	20	29	1,988,422	2,159,558	2,202,946	1,989,121	2,160,344	2,203,850
127	1,333	569	751	1,115	1,792	2,244	3,032	3,474	4,572
	2,789	2,789	2,789				2,789	2,789	2,789
	124	149	155				124	149	155
	32	32	32	8,053	8,887	8,886	8,489	9,436	9,345
	30,350	30,350	30,350				30,350	30,350	30,350
	6,513	6,513	6,513	1,627	1,627	1,627	8,140	8,140	8,140
	10,060	12,276	15,344				10,060	12,276	15,344
26,800	625	847	1,006	2,140	670	670	8,687	18,809	28,609
06,611	73,245	80,970	90,635	2,019,249	2,191,655	2,243,422	2,255,814	2,472,269	2,619,136

APPENDIX B

RESPONSES TO NATIONAL WATER COMMISSION

In the Summer and Fall of 1969, the National Water Commission held a series of hearings "to learn what the public thought about the water situation in the United States."¹ To indicate the general nature of subjects to be discussed, the Commission circulated a list of twenty-five questions. State responses indicated their interest in the MacCarran Amendment and state-federal relations in general.

The National Water Commission asked:²

In what way does present law regarding the ownership of water rights encourage or discourage wise use of water? Should changes be made in laws governing federally-owned water rights?

The Western States responded:³

California

California has consistently urged that Congress clarify the respective interests of the United States and the states in the use in certain streams. This is a reaction to a series of United States Supreme Court decisions which have been adverse to state water rights by holding that on withdrawn or reserved lands, water rights created by state law are subject to federal uses on such land. Thus, state-created water rights subsequent to the reservation of public lands are subordinate to the reserved water rights, and no compensation need be paid by the Federal Government when use of the reserved water right results in an interference (taking) of a state-created water right.

* * *

The cases recognize a priority in favor of the water rights of these reservations, related to the date of their establishment.

¹The National Water Commission, Interim Report No. 1: Annual Report for 1969, p. 5.

²Id at 40.

³The National Water Commission circulated a list of 25 questions and 31 tentative programs of studies. Arizona, Colorado, Idaho and Washington commented on the studies, but did not respond specifically to the 25 questions.

But the quantity of the right is not established unless and until that water right is litigated, usually many years after creation of the reservation. When the magnitude of the water right is finally determined, as it was in *Arizona v. California*, the quantity may be fixed by a determination of the reasonable requirements of the reservation, but this determination (at least in the case cited) has been controlled by the standards of physical and economic feasibility prevailing at the time of the decision, not those which existed at the time when the reservation was created. In the interval between establishment of the reservation and the determination of the quantity of its water rights (this interval may amount to several decades), uses may have been built up under state law appropriations, or conceivably under federal authorizations. These are cut off, without compensation, to the extent of their conflicts with the water right subsequently "quantified" for that reservation in a court decree, which relates the right to that quantity back to the date of creation of the reservation. It would seem only fair that the quantity of the right should be established at the time of the creation of the right, as is required by state appropriation laws.

* * *

It seems to many of us that Congress, in the Reclamation Act of 1902 and supplementary legislation, recognized a sound principle when it directed the Secretary of the Interior to acquire water rights for federal projects in compliance with state law, whether those rights are initiated by appropriation or are acquired from prior appropriators. The Supreme Court in *Arizona v. California* recognized the power of Congress to create water rights by authorizing the impounding and disposition of waters not previously appropriated, and to do so without compliance with state law. There have been, and will be again, cases in which this is necessary. But I believe that the Commission should recommend that, in the absence of specific congressional directions to the contrary, the Federal Government should initiate or acquire water rights (at least consumptive use rights) in accordance with, and not by supersedure of, the laws of the state in which the water is diverted or impounded.

Montana

The State of Montana, together with most western states, has been greatly disturbed by the constant contention of the

Department of Justice that the United States is the actual owner of all the waters in all of the western streams, and that the Federal Government, therefor, is supreme and may ignore the laws of the various states. We, therefore, firmly support the inherent right and obligation of the people, with or without assistance from the Federal Government, to develop their water resources and to protect their right to continued use within the framework of applicable interstate compacts and the water laws of the respective states. We feel that this is of utmost importance and one which will have to be given an in-depth study by your Commission with the hope that your leadership may help to resolve this extremely important problem.

Nevada

In our view one of the most critical problems is a resolution of the jurisdictional question regarding authority for administering water rights and water supplies originating on, over or beneath the public lands. This issue has been the subject of much controversy and investigation, including review by the Public Land Law Review Commission. The seriousness of the problem has been minimized by those who for one reason or another object to appropriate federal legislation to clarify the issue. We urge you to not pass lightly over this matter on the grounds that no material damage or adverse results have occurred because of this unresolved question. I think this is analogous to the very real and practical problem that we all face in the determination and assignment of benefits to such factors as aesthetics and environment in consideration of water development projects. The damage or adverse affects from the unresolved jurisdictional question may be difficult to quantify in dollars and cents. However, the "cloud" of the reservation doctrine and the ever-present effort by some to extend the interpretation of the reservation doctrine is in a sense an open ended demand which thwarts development of our resource water. To our knowledge all past attempts to resolve this issue through proposed legislation have been restricted to surface water supplies. Because the ground water resource will become more significant in meeting our future demands, this source and all sources of supply should be specified in any action to clarify the question.

New Mexico

New Mexico's water law, as it applies to both underground and surface sources, is based on the doctrine of prior appropriation. Rights to the use of water are based on beneficial use and priority in time of appropriation gives the better right. All of the waters of the State belong to the public, and are subject to appropriation in accordance with law under the supervision of the State Engineer. Under the established juridical system, wise use is encouraged and waste is discouraged. Our statutes permit the change of point of diversion and place and purpose of use of water rights with the consent of the owner. Thus, economic competition which tends to move water to the currently highest economic use is allowed.

We concede the virtue and validity of an overlapping system of State and Federal jurisdiction and authority. However, it is out of this dual sovereignty that some confusion arises. Much of this uncertainty derives from the assertion of Reservation Doctrine claims by the United States. Under this doctrine, the United States claims all the water needed for the purpose of the reservation with the priority of the date of creation of the reservation.

We cite here, in the broadest terms, areas of potential legislative change, designed to bring about a more favorable climate for furtherance of both state and federal goals in water resources planning and development. First, there should be a way to quantify the Reservation Doctrine claims of the United States. There should be legislation which would require federal agencies to inventory present water uses and claims of right to the use of water for a specified time into the future. Such legislation should include provisions making such claims binding upon the United States by the establishment of a procedure for settling of those claims. It is important for planners at the state, local and private levels and for the federal government itself, that such claims be identified as to quantity and priority and geographic location.

In addition to the inventory and procedures for definition discussed above, it is desirable that there be a liberalization of the so-called McCarran Amendment (43 U.S.C. Section 666) to clarify the entitlement of the states, or subdivisions thereof,

to secure judicial clarification of the nature and extent of all federal water rights claimed including Indian rights.

Oregon

One of the major questions in the legal area in the western states is the lack of clarification of state-federal jurisdiction over water. Primary attention has been focused on the impact of this on irrigation, but in Oregon, at least, most of our cities and major water-using industries utilize water that arises from or flows over federal lands. This matter has been the subject of extensive hearings before Congressional committees and of numerous court cases without, at the moment, satisfactory resolution. We believe this particular matter is worthy of the Commission's attention and hopefully leadership in resolution of the problem.

Utah

There is a long-standing controversy regarding the role of the Federal and State Governments in the field of water rights. We believe the Commission should address itself to this problem and with the help of the federal agencies and the states, seek to outline a means by which this long-standing problem can be resolved in a manner that protects the rights of all of our citizens. Unless this is resolved in the near future, a major crisis in state-federal relations is likely to arise within a few years.

Wyoming

One of the most important problems facing the Western States today relates to the so-called "Reservation Doctrine," and the related question of jurisdiction over water use and water rights. The Public Land Law Review Commission is studying the problem in depth, and hence it may not be necessary to comment in detail. We feel that federal claims of reservation of unlimited quantities of water for use on federal reservations, with a priority as of the date of the reservation, create a cloud over state-granted water rights which is intolerable. Such unquantified reservations would limit future development and discourage investment in water projects. National Forest Reserves in Wyoming cover most of the high

water-producing areas, and these forests were reserved prior to many of our state-granted water rights. The potential impact of the Reservation Doctrine on our State is significant. At its extreme it could seriously damage existing water users, and as a minimum, it creates a cloud over future water development which needs to be removed.

Jurisdiction over water resources and the authority to issue rights for the use of water must be clearly established if we hope to maintain an orderly system of water administration. Dual jurisdiction simply cannot work. The states have traditionally accepted and fulfilled this responsibility and there does not appear to be sufficient reason to modify this arrangement.

The National Water Commission would appear to be an appropriate entity to study this question. Even though the Public Land Law Review Commission is expected to make its recommendations within a year, the non-governmental orientation of your Commission may well indicate the possibility of a different conclusion being reached. The question is of sufficient importance to justify a serious effort to resolve the problem before it becomes more acute.

APPENDIX C

THE TREND TOWARD SOVEREIGN RESPONSIBILITY

Florida

The modern movement in State Courts away from sovereign immunity and toward sovereign responsibility began in Florida in 1957 when the Florida Supreme Court held a municipality liable for the wrongful death of a jailed inmate who was suffocated by smoke, stating:

[O]ur own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated. The problem in Florida has become more confusing because of an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside as we should any other archaic and outmoded concept. . . . The great body of our laws is the product of progressive thinking which attune traditional concepts to the needs and demands of changing times. The modern city is a substantial measure of large business institution. . . . To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the 20th century upon an 18th century anachronism. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 60 A.L.R. 2d 1193 (Fla. 1957).

Colorado

The Colorado court declared: "sovereign immunity may be a proper subject for discussion by students of mythology. It finds no haven or refuge in this court." *Colorado Racing Commission v. Brush Racing Association*, 136 Colo. 279, 284; 316 P.2d, 582, 585, (1957). Later the court said: "The doctrine of sovereignty in Colorado is in limbo, only the memory lingers on." *Stone v. Currigan*, 138 Colo. 442, 448; 334 P.2d. 740, 743, (1959). Subsequently the court by a four to three decision held that the immunity doctrine had to be followed. *City and County of Denver v. Madison*, 142 Colo. 1, 351 P.2d 826, (1960).

Illinois

The Illinois Supreme Court elaborately discussed reasons for sovereign immunity and announced:

We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reasons, and has no rightful place in modern day society. . . . Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. . . . We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to over-rule those decisions and establish a rule consonant with our present day concepts of right and justice. *Monitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, 163 N.E. 2d 89, 86 A.L.R. 2d 469 (1959) certiorari denied 362 U.S. 968, 80 S. Ct. 955, 4 L.Ed. 2d 900 (1960).

New Jersey

The New Jersey Court eliminated a large chunk of sovereign immunity when the court rejected the argument that a change in the law should be left to the legislature: "Surely it cannot be urged successfully that an outmoded, inequitable, and artificial curtailment of the general rule of action created by the judicial branch of the government cannot or should not be removed by its creator. . . . [J]udicial and not legislative action closed the court doors, and the same hand can, and, in proper circumstances should, reopen them." *MacAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820, 88 A.L.R. 2d 313 (1960).

Minnesota

A unanimous Minnesota court repudiated the doctrine of sovereign immunity, stating: "Since we have repeatedly proclaimed that this defense is based on neither justice nor reason, the time is now at hand when corrective measures

should be taken by either legislative or judicial fiat." 264 Minn. at page 285, 118 N.W. 2d at page 799. The court declared: "Even in jurisdictions which adhere to the immunity doctrine, seldom is any justification advanced beyond the rule of *stare decisis*. Our considerations of the origins of tort immunity persuade us that its genesis was accidental and was characterized by expediency, and that its continuation has stemmed from inertia." *Spaniel v. Mounds View School District*, 264 Minn. 279, 281, 118 N.W. 2d 795, 796 (1962).

Wisconsin

The Wisconsin court unanimously abolished sovereign immunity for tort liability and supported with many quotations its statement that: "There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine." 17 Wis. 2d at page 33, 115 N.W. 2d at page 621. The court found that "it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective amendments," announcing that "hence forward . . . the rule is liability — the exception is immunity." *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W. 2d 618, 625 (1962).

California

Justice Traynor traced the history of sovereign immunity and declared:

The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . . None of the reasons for its continuance can withstand analysis. . . . It has become riddled with exceptions . . . and the exceptions operate so illogically as to cause serious inequality.

To the argument that the legislature, not the court, should remove the immunity, the Court responded that the doctrine was court-made, that the legislature had enacted various statutes waiving immunity in some areas, and that the various statutes "leave the court whether it should adhere to its own rule of immunity in other areas." *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

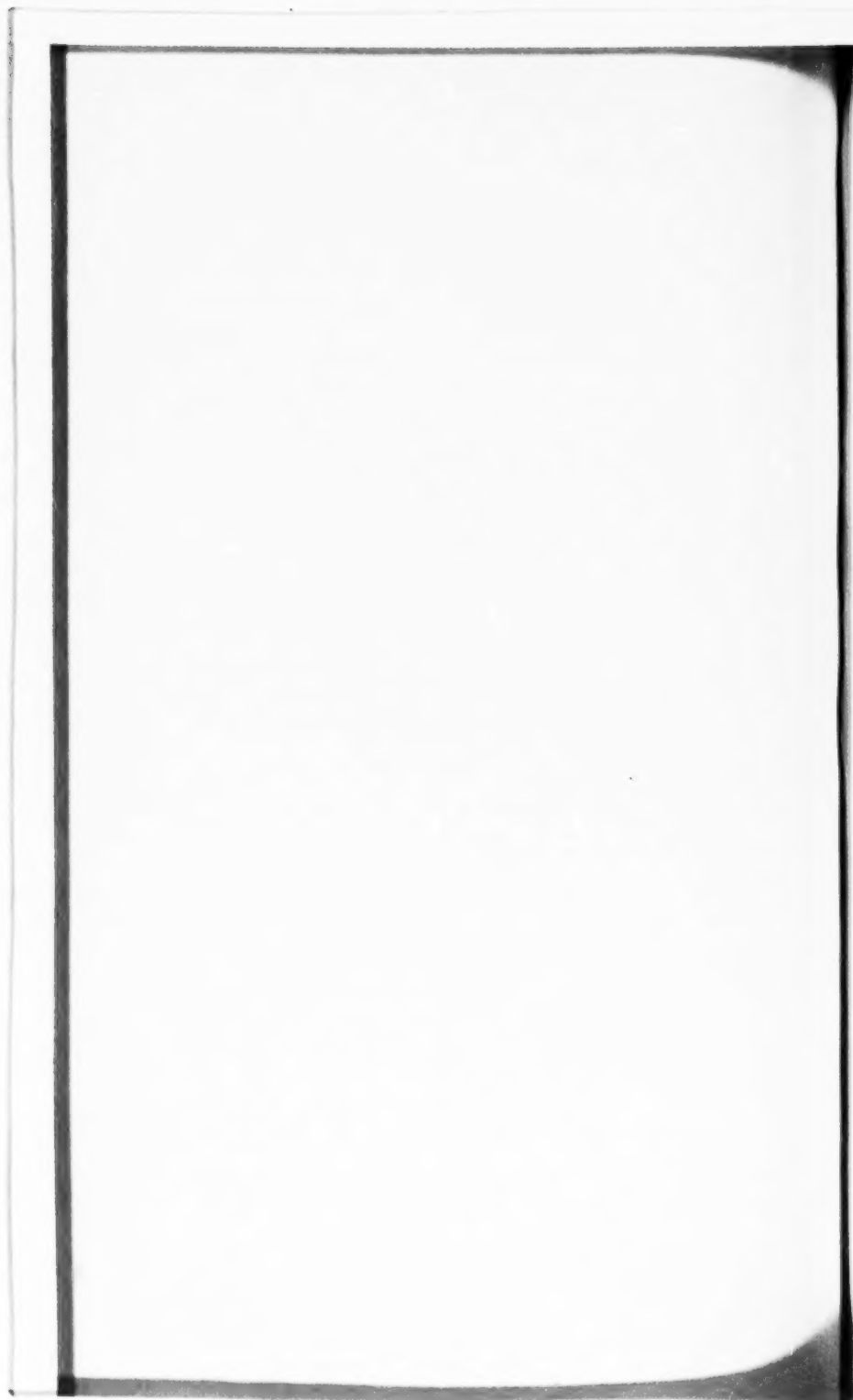
Michigan

The Michigan court announced:

From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. In this case, we over-rule preceding court-made law to the contrary. We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong. *Williams v. City of Detroit* 364 Mich. 231, 250, 111 N.W. 2d 1, 20 (1961).

Arizona

In 1963, the Arizona court declared: "We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be disregarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled." *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963).



Errata.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1970, No. 87

UNITED STATES vs. DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO, et al.

Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest
and Points and Authorities In Support Thereof, and Order Thereon.

* * * * *

APPENDIX B.

CONFLICTS OF INTEREST IN PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES

A Preface To Disaster For The American Indian People

William H. Veeder

* * * * *

Page iii	(a)(2)(i) Principles of Western and Indian law re- specting interpretations of conveyances applied by Supreme Court in Winters	54	change to 55
Page viii	Appendix B, Order In The District Court * * * For Water Division No. 5	70	change to 71
Page xiv	Report on hearing on H. R. 4671, Interior and Insular Affairs Committee, 89th Cong., 1st Sess.	35	change to 36

Page	Footnote	Printed	Correct
1	2	APPENDIX, pages 12 et seq.	APPENDIX, pages 18 et seq.
2	4	APPENDIX, page 13	APPENDIX, page 19
3	5	Appendix, pp. 47 et seq.	Appendix, pp. 66 et seq.
	"	Appendix, pp. 50-51	Appendix, pp. 71-72
	"	Appendix, p. 52	Appendix, pp. 73-74
	"	Appendix, pp. 76, 78 et seq.	Appendix, pp. 106, 108 et seq.
	"	Appendix, pp. 86 et seq.	Appendix, pp. 119 et seq.
3	6	Appendix, pp. 10 et seq., 12 et seq.	Appendix, pp. 15 et seq., 18 et seq.
	"	Appendix, p. 19	Appendix, p. 28
	"	Appendix, p. 24 footnote 3	Appendix, p. 35 footnote 3

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	"	Appendix, p. 7	Appendix, pp. 10 et seq.
	"	Appendix, p. 24, footnote 5	Appendix, p. 36, footnote 5
	"	Appendix, pp. 22 et seq.	Appendix, pp. 32 et seq.
5	7	APPENDIX, pages 53, 54-57; 59-75; 85; 40 et seq.	APPENDIX, pages 75, 76-81; 82-105; 117; 56 et seq.
	8	APPENDIX, pages 63 et seq. APPENDIX, page 73	APPENDIX, pages 87 et seq. APPENDIX, page 102
6	9	APPENDIX, pages 76, 79 footnote 3	APPENDIX, pages 106, 110 footnote 3
	10	* * * <i>infra</i> pp. 37 et seq.	* * * <i>infra</i> pp. 41 et seq.
	11	APPENDIX, pages 82, 83, 84, 85	APPENDIX, pages 114, 115, 116, 117
10	13	APPENDIX, * * * <i>infra</i> , page 66	APPENDIX, pages 1, 2, 3; * * * <i>infra</i> , page 72 * * *
	14	APPENDIX, pages 1, 2-3; 19, 20-21; * * * page 37 * * * particularly page 61	APPENDIX, pages 1, 2-5; 28, 29-32; * * * page 41 * * * particularly page 66
	15	APPENDIX, pages 19, 22 * * * <i>infra</i> page 66	APPENDIX, pages 28, 32 * * * <i>infra</i> page 72
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14	23	* * * <i>infra</i> , p. 73	* * * <i>infra</i> p. 79
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IN THE
Supreme Court of the United States

October Term, 1970
No. 87

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
and STATE OF COLORADO, *et al.*

**Motion of Fort Mojave Tribe of Indians for Leave to
File Suggestion of Interest and Points and Au-
thorities in Support Thereof, and Order Thereon.**

COMES NOW the Fort Mojave Tribe of Indians, by
Raymond C. Simpson, Tribal Attorney, at the discre-
tion and the authority of the Tribal Council and with-
out entering their appearance as a party, moves the
Court for leave to file their Suggestions of Interest
and Points and Authorities in Support Thereof.

Dated: April 8, 1971.

RAYMOND C. SIMPSON,
*Tribal Attorney for Fort Mojave
Tribe of Indians.*



IN THE
Supreme Court of the United States

October Term, 1970

No. 87

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
and STATE OF COLORADO, *et al.*

**Order on Motion of Fort Mojave Tribe of Indians for
Leave to File Suggestions of Interest and Points
and Authorities in Support Thereof.**

Based upon the foregoing motion, and good cause
appearing therefore, IT IS ORDERED that the Fort
Mojave Tribe of Indians' Motion for leave to file a
Suggestion of Interest and Points and Authorities in
support thereof is granted.

Dated: This day of, 1971.

UNITED STATES SUPREME COURT
JUDGE.



IN THE

Supreme Court of the United States

October Term, 1970

No. 87

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
and STATE OF COLORADO, *et al.*

**Suggestion of Interest of the Fort Mojave Tribe of In-
dians and Points and Authorities in Support There-
of.**

COMES NOW the Fort Mojave Tribe of Indians by Raymond C. Simpson, Tribal Attorney, under the direction and by the authority of their Tribal Council, without submitting to the jurisdiction of the Court, and appearing specially, solely and only for the purpose of suggesting to this Honorable Court that said Indian Tribe has a direct, immediate, and vital interest in the subject matter of the above-entitled action and that they are indispensable parties thereto by reason of the following:

- 1. Prior Adjudication of the Right to Water by the Fort Mojave Tribe of Indians Clearly Established Their Interest in the Subject Matter of the Case at Bar.**

This Honorable Court in *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468 decreed that the Fort Mojave Tribe has clear and definitive legal rights to use the

water from the mainstream of the Colorado River when they said:

"We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."

These legal rights to the use of said water accords to them an entitlement of approximately 122,640 acre feet of water annually. At least seventy percent (70%) of the water flowing to the Fort Mojave Indian Reservation from the mainstream of the Colorado River originates in the State of Colorado. A very substantial part of that water, so essential to the implementation of the portion of the Court's decree in *Arizona v. California, supra*, regarding the Fort Mojave Indians, is the Eagle River. Without this source of water supply, the water rights of the Mojaves would, of course, become vacuous since the entitlement of the Mojaves to water from the mainstream of the Colorado River is totally dependent upon the water supplied by its tributaries. As a consequence, any reduction of water in the Colorado River by reason of Eagle River (tributary) use clearly creates an intolerable plight for the Fort Mojave Indians because such upstream use will materially reduce the quantities of water entering the mainstream of the Colorado River which would otherwise flow to the Fort Mojave Indian Reservation. This is particularly significant since it is a matter of indisputable record that the Colorado River has been most seriously over-appropriated. In fact, it is also a matter of record that current water yields reaching the Fort Mojave Indian Reservation

are falling far short of the anticipated flows when the River was originally apportioned between the Upper and Lower Basins of the Colorado.

Examination of the Map of the Colorado River Basin appended hereto as Appendix A, and by reference made a part hereof, graphically illustrates the flow of the tributaries into the mainstream of the Colorado River and its flow into and through the Fort Mojave Reservation.

It is, of course, elemental that the said decreed rights to the use of water by the Fort Mojave Indian Tribe in the mainstream of the Colorado River and its tributaries are interests in real property of the highest dignity. Those rights, as asserted above, although in the mainstream of the Colorado River, in order to be meaningful, must extend to the sources of that water, i.e., the tributaries of that stream such as the Eagle River. It is this fundamental property interest of the Fort Mojave Indians that causes them to have a direct, immediate, and vital interest in the subject matter of the above-entitled case plus making them an indispensable party thereto. Any other conclusion has been carefully characterized by William H. Veeder, attorney at law and well-known Conservation Specialist for the Bureau of Indian Affairs, in his special Report to the Commissioner of Indian Affairs entitled "Conflicts of Interest In Proceedings Before the Supreme Court of the United States", as "A Preface To Disaster For The American Indian People." A true and correct copy thereof is appended hereto as Appendix B, and by reference made a part hereof. This Report was released on March 23, 1971, and is concerned exclusively with the *Eagle River* Case No. 87 and Water Division No. 5 Case No. 812.

2. The Fort Mojave Tribe and Other Tribes Similarly Situated Will Be Irreparably Damaged if Their Rights to the Use of Water Are to Be Henceforth Adjudicated in State Courts.

On March 24, 1971, one day after release of the said Veeder Report, this Honorable Court rendered a decision in the Eagle River Case No. 87, declaring that Section 666 of Title 43 of the United States Code is an all-inclusive statutory provision that subjects to general adjudication in state proceedings, all rights of the United States to water within a particular state's jurisdiction, regardless of how they were acquired. Therein specific reference was made to this Court's decree in *Arizona v. California, supra*, with the Court expressly stating that "In *Arizona v. California* we were primarily concerned with Indian reservations." Nevertheless, at no place in the decision pertaining to Eagle River is there any distinction drawn between the entitlement of the United States and the Indian entitlement vested in the United States as trustee thereof, the latter being "private" as opposed to public in character. The Indian rights are distinct and separate from those rights claimed and administered by the agencies of the Forest Service and the Bureau of Land Management alluded to in the said Eagle River case. In other words, it is submitted that there has been a shocking failure by the United States as trustee for the Indians, to distinguish or to indeed even make any reference to the private rights of the Fort Mojave Indians, or any other Indians similarly situated, in the said Eagle River case. The validity of this conclusion is completely and forcefully documented in our Appendix B.

This failure is all pervasive, and is exemplified by a quotation from the Petition of Certiorari in Water Di-

vision No. 5 Case 812 (companion case to Eagle River Case No. 87). Therein it was stated:

"Reserved rights (of the United States) have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to the water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601." *Petition for Writ of Certiorari** Case No. 87 on page 3.*

The paraphrasing of the decision of *Arizona v. California*, *supra*, as last cited, is truly critical to the Fort Mojave Tribe because most assuredly the Mojave rights are not an "entitlement of the United States to use**" water. Rather, the citation, when considered in context, revealed the Mojaves and other Indians similarly situated have rights to the use of water which have been recognized and distinguished from those of the United States for public purposes.

Again failure to establish the all important difference between the "private" rights of the Indians, held in trust for them by the United States, from those of the Federal Government, held for the public as a whole, is found in this statement from the brief filed with the Supreme Court:

"As indicated previously** the United States unquestionably has the right to use as much water from sources on lands withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn**".

Not only is the statement incorrect, but it should be noted that the cases cited in the brief to support the

contention relate exclusively to Indian rights as opposed to public rights. These cases are found in the brief for the United States, Case No. 87 on page 10, all of which underscores the imperative need to distinguish the Indian rights from those of the public.

In keeping with the tone and temper of said erroneous excerpt quoted from the Petition of Certiorari and the briefs filed in Case No. 87 is still another excerpt taken from the Petition and paraphrased in the brief to the effect that: "The magnitude of the problem is indicated by the fact that about four hundred forty-three million acres have been withdrawn from the Public Domain for use as Indian reservations, national parks, national forest, national recreation areas, national manuments, etc." Petition for Certiorari** on pages 10-11. Failure to separate and distinguish the real property rights of the American Indians from the public rights evidences the unfair and incorrect position which the United States has presented to the Supreme Court in regard to the private interests of the Indian which is potently spelled out and detailed in said Appendix B. From the legal standpoint this presents an intolerable situation for the Fort Mojave Indian Tribe and for all other American Indians whose rights to use of water are in effect intermingled with the "reserve" rights of the United States to the use of water for the public at large.

It is respectfully submitted that perhaps a fatal blow to the Indian interests was, we believe, inadvertently delivered by Justice Douglas when he also failed to distinguish the Indian real property interests in his decision of March 24, 1971, in the Eagle River Case No. 87. Therein he stated:

"As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian Reservations. *Id.*, 598-601. The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave. *Id.*, 600-601."

It cannot be denied that this quoted statement of Justice Douglas fails to distinguish the private Indian rights involved from the public rights of the United States. It must also be admitted that one can reasonably conclude therefrom that the private Indian rights will henceforth be governed by this Court's holding therein that state courts have jurisdiction to adjudicate the reserved water rights of the United States. Furthermore it should be observed that this court made its decision herein without distinguishing the Indian Rights despite a clear declaration by the Congress of the United States that no state shall have jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" property still held in trust by the United States for Indians, and that Congress expressly included water rights therein. Public Law 280 (67 Stat. 589, 28 U.S.C. Sec. 1360(b)).

The gravest consequence to the Fort Mojave Tribe of Indians will necessarily ensue by the failure of the petitions for certiorari and the brief in Eagle River Case No. 87 to point out to the Supreme Court that the waiver of sovereign immunity from suit under 43 U.S.C. 666 does not in any way pertain to Indian

rights nor to their use of water. It is basic law that unless the Indian immunity from suit is specifically waived by the Congress that immunity is unimpaired. From the language of 43 U.S.C. 666, it is manifestly clear that the Congress did not intend to include the rights of the American Indians within the scope of that waiver. If construction of the Act were permissible, which is denied, the legislative history would result in the rejection of any concept as to the applicability of the Act to the Indian rights and interests. This failure to distinguish the Indian rights from the public rights of the United States government could therefore result in subjecting the rights of the American Indians to adjudication thereof under the laws of the states. Because the state laws governing the rights of the use of water are frequently incompatible with the laws governing the Indian rights to the use of water, the extreme prejudice to the Indian rights becomes patently clear. In short, the repeated failure of the Federal government, as trustee for the Indians, to bring to the Supreme Court's attention the significant disparity between the laws governing Indian rights and the laws governing the public rights of the United States, could result in serious impairment or extinguishment of the Indian rights. Thus, failure to clarify this in Eagle River Case No. 87 sufficiently muddies the waters so that it is not an over statement to declare that the Indian real property rights, to a large extent, might be seriously infringed upon or completely extinguished.

WHEREFORE, the Fort Mojave Tribe of Indians respectfully represent:

I.

That the Fort Mojave Tribe of Indians is a necessary and indispensable party to this action but they cannot be made parties thereto since Congressional consent therefore has not been granted, and no order, judgment or other action of this court could or would be effective against the Fort Mojave Tribe of Indians or any other Indians similarly situated.

II.

That this Court is without jurisdiction in the premises, and that this Court's decision of March 24, 1971, in Eagle River Case No. 87, should therefore be vacated and a dismissal of the action ordered *sua sponte* due to lack of jurisdiction.

RAYMOND C. SIMPSON,
Tribal Attorney.

MEMORANDUM OF POINTS AND AUTHORITIES.

In the early landmark case of *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515, Chief Justice Marshall declared in unequivocal language that Indian tribes are distinct political entities with the right of self-government, having exclusive authority within their territorial boundaries and that they are not subject to the laws of the states in which they might be located. The broad principles of the said *Worcester* decision have been adhered to by the courts ever since, and were reaffirmed by this Honorable Court as late as *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269.

The Fort Mojave Indian Reservation is geographically located in the States of Arizona, California, and Nevada with the mainstream of the Colorado River running directly through it. All three of said States have from time to time attempted to impose their laws upon the Fort Mojave Tribe of Indians who, in turn, have resisted by relying upon their legal rights as described in the *Worcester* case. In 1953 the picture of state encroachment was displayed before the Congress of the United States with the accompanying argument that "law and order" required that the respective states be granted a limited jurisdiction. Congress agreed and proceeded to pass Public Law 280 (28 U.S.C. 1360) for that limited purpose, but was emphatic in Section 1360(b) thereof that real property rights, including land and water, still held in trust by the United States for the benefit of Indians, did not become subject to the jurisdiction of any state or its political subdivisions. Hence, when this Court, in rendering its decision in *Eagle River Case No. 87*, held that the State of Colorado had jurisdiction to adjudicate the reserved rights of the United States, it was acting contrary to Con-

gressional mandate unless it is made clear that said decision is in no way applicable to the privately owned property rights of the Indians, held in trust by the United States.

I.

A Suggestion of Interest is the accepted method of bringing to the attention of the Court the interest of an entity such as an Indian tribe in the subject matter of a suit, and the Court's lack of jurisdiction of any suit designed to circumscribe, limit and affect such an entity in the use and enjoyment of its property or property rights.

Calnevari Corporation v. River Farms, Inc., No. 62-361-K Civil, United States District Court, So. Distr. of Calif., Central Division (1965);

Stanley v. Schwalby, 147 U.S. 508 (1893);

Florida v. Georgia, 58 U.S. 478 (1854);

Calhoun County, Fla. v. Roberts, 137 F. 2d 130 (C.A. 5, 1943);

Booth v. Fletcher, 101 F. 2d 676, (C.A. D.C. 1939);

Barron & Holtzoff (Wright); Federal Practice and Procedure Section 352.

II.

A suggestion of interest by the Fort Mojave Tribe of Indians showing an interest in water rights by way of reference to a decree of this Honorable Court granting them specific water rights, or to an Act of Congress prohibiting State adjudication thereof, should be sufficient to show that they are an indispensable party.

When a question of the District Court's jurisdiction is raised, either by a party or by the Court

on its own motion, the Court may inquire by affidavits or otherwise, into the facts as they exist.

F.R.C.P. Rule 12(b);

1360(b) Title 28 of the U.S. Code states:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*" (Emphasis ours).

Wetmore v. Rymer, 169 U.S. 115, 120-121;

McNutt v. General Motors Corp., 298 U.S. 178;

KVGS, Inc. v. Associated Press, 299 U.S. 269.

III.

The Indians are indispensable parties in any case involving property in which they have an interest.

Maricopa County v. Valley Bank, 318 U.S. 357 (1943);

United States v. Alabama, 313 U.S. 274 (1941);

Minnesota v. United States, 305 U.S. 382 (1939);

Arizona v. California, 298 U.S. 558 (1936).

IV.

The title or property interest of the Fort Mojave Indian Tribe is put in issue when an Indian Tribe claims an interest.

Louisiana v. Garfield, 211 U.S. 70;

Stanley v. Schwalby, 162 U.S. 255;

Oregon v. Hitchcock, 202 U.S. 60;

Goldberg v. Daniels, 231 U.S. 218.

V.

Indian Tribes under the tutelage of the United States are not subject to suit without the consent of Congress, and Congress alone can authorize such a suit.

Thebo v. Choctaw Tribe of Indians, 66 Fed. 372 (1895) wherein the Court said:

"It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action in any court it might designate. Acts of Congress have been passed, specially conferring on the courts therein named jurisdiction over all controversies arising between the railroad companies authorized to construct their roads through the Indian Territory and the Choctaw Nation and the other nations and tribes of Indians owning lands in the territory through which the railroads might be constructed. Other acts have been passed authorizing suits to be brought by or against these Indian Nations in the Indian Territory to settle controversies between them and the United States and between themselves.

Among such acts are the following: 'An act for the ascertainment of amount due the Choctaw Nation.' 21 Stat. 504. Act of July 4, 1884 (23

Stat. 73), granting the right of way through the Indian Territory to the Southern Kansas Railway Company. An act granting right of way through Indian Territory to Kansas & Arkansas Valley Railway Company, 24 Stat. 73. An act granting the right of way through the Indian Territory to the Kansas City, Ft. Scott & Gulf Railway Company. Id. 124. An act granting the right of way through Indian Territory to Ft. Worth & Denver City Railway Company. Id. 419. An act granting the right of way through Indian Territory to the Chicago, Kansas & Nebraska Railway Company. Id. 446. An act granting right of way through the Indian Territory to the Choctaw Coal & Railway Company. 25 Stat. 35. An act granting the right of way to the Ft. Smith & El Paso Railway Company through the Indian Territory. Id. 162. An act granting the right of way to Kansas City & Pacific Railway Company through the Indian Territory. Id. 140. An act granting the right of way to Paris, Choctaw & Little Rock Railway Company through the Indian Territory. Id. 205. An act granting right of way to Ft. Smith, Paris & Dardanelle Railway Company through Indian Territory. Id. 745. An act to authorize the Kansas & Arkansas Valley Railway Company to construct an additional railroad through the Indian Territory. 26 Stat. 783.

The constitutional competency of Congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case (pp. 373-374).

Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. 'It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state.' *Beers v. Arkansas*, 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals. When the Supreme Court of the United States in *Chisholm v. Georgia*, 2 Dall. 419, decided that under the

constitution the court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was straightway adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state 'is substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject to coercion'. In re Ayers, 123 U.S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of Congress not to sanction suits generally against these Indian Nations or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the States under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of Congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms (pp. 375-376)."

Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529;
Haile v. Saunooke, 148 Fed. Supp. 604, Aff'd.
246 F. 2d 293, Cert. denied 78 S. Ct. 268
(1957).

VI.

Indian Tribes may not be sued without their consent thereto, and this proceeding should be dismissed *sua sponte* since the Mojave Indians are an indispensable party who were never joined, and who do not consent to be sued.

Turner v. United States, 248 U.S. 354 (1919);
United States v. U.S. Fidelity & Guar. Co., 106
F. 2d 804 (1939), 309 U.S. 506 (1940).

See also

United States v. McShan v. Sherrill, 283 F. 2d
462 (1960);
Partan, et al., 132 F. 2d 886 (1943), on the
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United States v. Sherwood, 312 U.S. 584
(1941);
United States v. Shaw, 309 U.S. 495 (1940);
Minnesota v. United States, 305 U.S. 382
(1939).

VII.

There can be no waiver of an Indian tribe's immunity from suit. This proposition of law was quite graphically illustrated in *United States v. United States Fidelity & Guaranty Co.*, 60 S. Ct. 653, at 657, 309 U.S. 506 at 514, wherein the Court said:

"The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. As no appeal was taken from this Missouri judgment, it is subject to collateral at-

tack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give policy to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body."

It is clearly apparent that in the instant case the Fort Mojave Indian Tribe must be deemed an indispensable party; that they have not consented to be sued, and that this Court's decision of March 24, 1971, in the Eagle River Case No. 87 should therefore be vacated and a dismissal of the action ordered *sua sponte* by reason of lack of jurisdiction.

RAYMOND C. SIMPSON

Tribal Attorney.

The hereinafter named Indian Tribes represented by Raymond C. Simpson also concur with the Fort Mojave Indian Tribe and do hereby join them in this proceeding on behalf of themselves and all other Indian tribes who may be similarly situated.

The Agua Caliente Band of Mission Indians at Palm Springs, California.

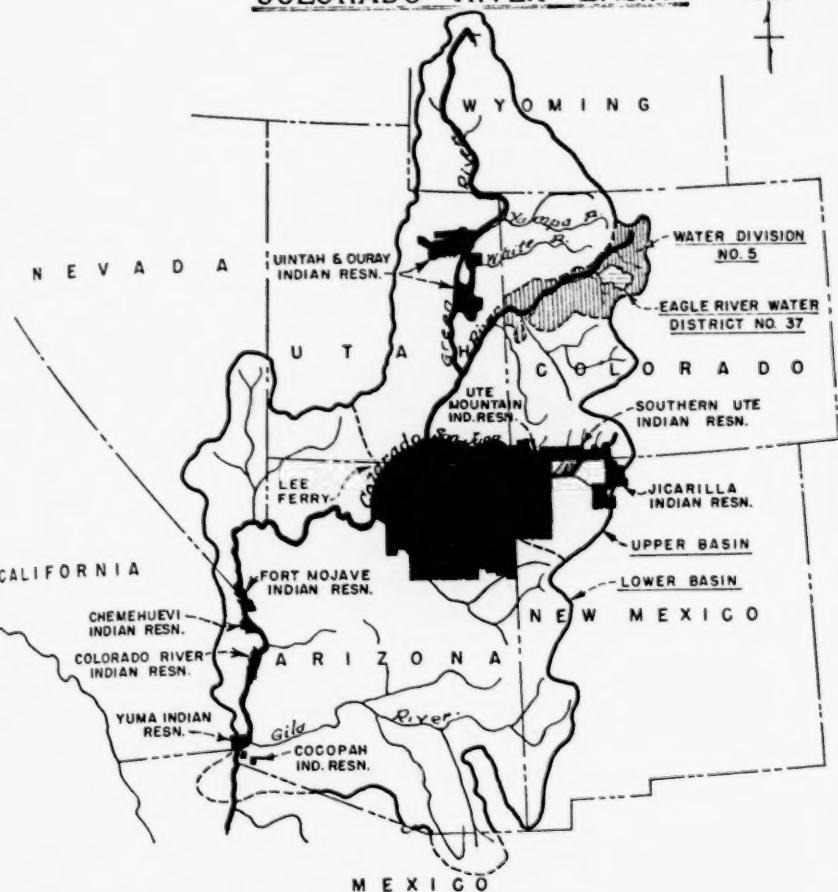
The Cabazon Band of Mission Indians at Indio, California.

The Quechan Indian Tribe at Yuma.

APPENDIX A.

COLORADO RIVER BASIN

NORTH



Map of The

COLORADO RIVER BASIN

ARIZONA V. CALIFORNIA [373 US 602]

TO WHICH THERE IS ADDED

THE EAGLE RIVER WATER DISTRICT NO. 37

COLORADO WATER DIVISION NO. 5

AND INDIAN RESERVATIONS ON THE MAIN STEM
OF THE COLORADO RIVER, THE GREEN RIVER AND
THE SAN JUAN RIVER AND THEIR TRIBUTARIES.

APPENDIX B.

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20242

CONFLICTS OF INTEREST IN PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES

* * * * *

A PREFACE TO DISASTER FOR THE AMERICAN INDIAN PEOPLE

William H. Veeder

* * * * *

**On Certiorari to the Supreme Court of the State of Colorado
Eagle River Adjudication, October Term, 1970, No. 87
Water Division No. 5 Adjudication, October Term, 1970,
No. 812**

March 23, 1971

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**CONFLICTS OF INTEREST
IN PROCEEDINGS BEFORE
THE SUPREME COURT OF THE
UNITED STATES**

* * * * *

**A PREFACE TO DISASTER FOR THE
AMERICAN INDIAN PEOPLE**

SUMMARY

(a) Presidential condemnation of Justice department's "inherent conflict of interest" respecting American Indians: "No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. * * * the Indians are the losers when such situations arise * * * the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists." That inherent conflict of interest within the Justice Department respecting the American Indian rights to the use of water both as to law and fact, is all-pervasive in the Adjudications to which this consideration pertains.

(b) American Indians have direct, immediate and inextricable interests in the *Eagle River and Water Division No. 5 Adjudications* before the Supreme Court by reason of the

1. subject matter of the litigation—rights to the use of water in the main stream of the Colorado River and its tributaries within the State of Colorado;

2. erroneous definition used by the Justice Department of the term "Reserved rights" to the use of water and the authorities cited by it;

3. almost total reliance by the Justice Department upon Indian law respecting rights to the use of water, while denying Indian interest in the proceedings;

4. precedents which must reasonably be expected from any decision of the Court.

(c) American Indian interest, in addition to those expressed in (b) above include: (1) the expressed willingness to subject the Federally owned rights to the use of water to the State police regulations pertaining to the jurisdiction, adjudication, administration and control of those rights; (2) an apparent willingness to submit the United States to the police regulations on a Statewide basis in regard to the jurisdiction, adjudication, control and administration of rights to the use of water allegedly pursuant to 43 U.S.C. 666, of seven States in the Colorado River Basin alone.

(d) Refusal of the Justice Department to distinguish between Indian private rights to the use of water which are held in trust for the Indians by the United States, and the public rights of the United States—rather including them in definition of “Reserved rights” of the United States—threatens all Indian rights to the use of water by reason of Colorado’s Supreme Court ruling, on review before the Supreme Court of the United States, that 43 U.S.C. 666 subjected “Reserved rights” to State police power, State court jurisdiction for adjudication, control and administration.

(e) Specific American Indian Reservations with rights to the use of water in the main stream of the

Colorado River and its tributaries within the State of Colorado:

(1) Supreme Court decreed rights in the main stream of the Colorado and its tributaries:

Fort Mojave, Fort Yuma, Colorado River, Chemehuevi, and Cocopah Reservations.

(2) Reservations within the State of Colorado with treaty rights to the use of water in the San Juan River and its tributaries:

Southern Ute and Ute Mountain Reservations.

(3) Reservations outside of Colorado with rights to the use of water in the San Juan River and its tributaries within that State:

(i) Navajo Indian Reservation—Treaty rights;

Jicarilla Apache Indian Reservation—Executive Order rights (In States of New Mexico, Arizona, Utah).

(ii) Uintah and Ouray Reservation—Treaty rights in Green River and its tributaries; White River and its tributaries within the State of Colorado (In State of Utah).

(Note: Rights of individual Indian Reservations except those decreed by the Supreme Court require separate analysis and presentation)

(f) *Winters Doctrine* American Indian rights to the use of water, interests in real property of highest dignity—private in nature held in trust by the United States for the Indians—for the use of the Indians, not the United States:

(1) Immemorial Indian rights to the use of water—title now resides and at all times resided,

in Indians—were not conveyed to the United States—include rights retained by Treaty, by agreement with the United States or otherwise.

(2) Invested rights to the use of water—title originally in Indians, extinguished by the United States, retransferred to the Indians by Executive Order of Congressional action.

(g) Erroneous definition by Justice Department of "Reserved rights" presented to the Supreme Court, if adopted by the Supreme Court, is tantamount to confiscation of American Indian rights not only in the Colorado River Basin but throughout the United States.

(h) Invasion and threatened invasion of Indian rights to the use of water:

(1) Colorado River and its tributaries vastly over-appropriated with the river yielding far less than originally estimated.

(2) Pollution of Colorado River stemming primarily from over-appropriation.

(3) Central Arizona Project being constructed in total disregard of wholly insufficient water supply for the project and present severely polluted character of Colorado River.

(4) Western U.S. Water Plan—A design for destruction of American Indian Reservations as viable communities.

(i) Denigration by Justice Department of title of American Indian rights before the Supreme Court.

(1) Inherent conflict of interest of Justice Department exemplified in *Eagle River Adjudication* and *Water Division No. 5 Adjudication*—the same Assistant Attorney General purports to defend

Indian titles while strenuously advocating against Indian titles in claims by Indians for compensation for seizure of their titles—explains erroneous definition of "Reserved rights" of United States allegedly supported by Indian law.

(2) Inherent conflict of interest of Justice Department in representing Federal agencies which claim adversely to Indians while it purports to represent Indians.

(j) Failure of Justice Department respecting its interpretation of 43 U.S.C. 666, properly and adequately to represent American Indians before the Supreme Court generally or in *Eagle River Adjudication* and *Water Division No. 5 Adjudication*:

(1) Failure to assert American Indian Tribes immune from suit and that Congress has not waived their immunity from suit as it pertains to Indian rights to the use of water by 43 U.S.C. 666 or otherwise.

(2) Failure of Justice Department to rely upon or refer to Federal Decree which must control, embracing entire drainage of the Colorado River within the State of Colorado—area virtually identical to that within *Water Division No. 5 Adjudication* including *Eagle River Adjudication*.

(3) Failure of Justice Department to deny applicability of 43 U.S.C. 666 on grounds it does not and could not have retrospective operation.

(4) Failure of Justice Department to object to proceedings under 43 U.S.C. 666 by reason of fact United States is not a "necessary" party as required by Congress; there is no case, no conflict, no controversy, no justiciable issue before the Supreme Court or the courts below.

[Seal]

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20242

CONFLICTS OF INTEREST
IN PROCEEDINGS BEFORE
THE SUPREME COURT OF THE
UNITED STATES

* * * * *

A PREFACE TO DISASTER FOR THE
AMERICAN INDIAN PEOPLE

William H. Veeder

* * * * *

ON CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

EAGLE RIVER ADJUDICATION,
OCTOBER TERM 1970, NO. 87
WATER DIVISION NO. 5 ADJUDICATION,
OCTOBER TERM, 1970, NO. 812

PLATE I.

IN THE SUPREME COURT OF THE UNITED STATES
EAGLE RIVER ADJUDICATION, OCTOBER TERM 1970,
NO. 87

WATER DIVISION NO. 5 ADJUDICATION, OCTOBER
TERM, 1970, NO. 812

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

INDIAN RESERVATIONS ON THE MAINSTREAM OF
THE COLORADO RIVER WITH DECREED RIGHTS
IN *ARIZONA V. CALIFORNIA* (373 U.S. 546, 596; 376
U.S. 340, 345).

RESERVATION

DECREED RIGHTS
ANNUAL Ac. Ft.
DECREED
ACREAGE

CHEMEHUEVI	11,340	1,900
COCOPAH	2,744	431
YUMA	51,616	7,743
COLORADO RIVER	717,148	107,588
FORT MOJAVE	122,648	18,974
TOTALS	905,496 Ac. Ft.	136,636 Ac.

INDIAN RESERVATIONS DIRECTLY INVOLVED IN
ADJUDICATIONS SHOWN ON FACING MAP

STATE OF COLORADO
UTE MOUNTAIN INDIAN RESERVATION
SOUTHERN UTE INDIAN RESERVATION
STATES OF ARIZONA, NEW MEXICO, UTAH
NAVAJO INDIAN RESERVATION
JICARILLA INDIAN RESERVATION
UINTAH AND OURAY INDIAN RESERVATION

COLORADO RIVER BASIN



Map of The

COLORADO RIVER BASIN

ARIZONA V. CALIFORNIA [373 US 602]

TO WHICH THERE IS ADDED

THE EAGLE RIVER WATER DISTRICT NO. 37

COLORADO WATER DIVISION NO. 5

AND INDIAN RESERVATIONS ON THE MAIN STEM
OF THE COLORADO RIVER, THE GREEN RIVER AND
THE SAN JUAN RIVER AND THEIR TRIBUTARIES.

[Seal]

UNITED STATES DEPARTMENT
OF THE INTERIOR

Bureau of Indian Affairs
Washington, D.C. 20242

CONFLICTS OF INTEREST
IN PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE UNITED STATES

A PREFACE TO DISASTER FOR THE
AMERICAN INDIAN PEOPLE

STATEMENT

- (a) *America Indians have direct, immediate and indispensable interests in the Eagle River Adjudication and Water Division No. 5 Adjudication*

American Indians have direct and immediate interests in the subject matter of the *Eagle River Adjudication* and the *Water Division No. 5 Adjudication*¹ now pending before the Supreme Court. Those two adjudications before the Supreme Court are on writs of certiorari to the Supreme Court of Colorado from a decision rendered by that court.² That decision of Colo-

¹*Eagle River Adjudication*: United States, Petitioner v. The District Court In And For The County Of Eagle And State Of Colorado, No. 87, October Term, 1970.

Water Division No. 5 Adjudication: United States of America, Petitioner v. The District Court In And For Water Division No. 5, State of Colorado, and the Judge Thereof, The Honorable Clifford H. Darrow, And The Water Referee Thereof, No. 812, October Term, 1970.

²APPENDIX, pages 12 et seq.; United States of America, Petitioner v. The District Court * * * County of Eagle * * * State of Colorado, et al., Colo.; 458 P.2d 760 (En Banc 1969).

rado's highest court held in effect that the Congress of the United States by an Act³ subsequently to be reviewed in detail, had subjected the rights to the use of water of the United States in the main stream of the Colorado River and the tributaries of that stream within the State of Colorado, to the jurisdiction of the State courts of Colorado for adjudication, control and administration.⁴

- (b) *There is no justiciable issue before the Supreme Court; United States is not a necessary party to adjudications; sua sponte dismissal should ensue by the Court; failure to dismiss creates grave threat to American Indians' rights to the use of water; Justice Department's cryptic and erroneous denial of Indian interests*

Truncated facts before the Supreme Court are infinitely simple. That circumstance prevails in regard to both of the adjudications. *Water Division No. 5* embraces all of the Colorado River drainage and its tributaries within the State of Colorado including the area encompassed within the *Eagle River Adjudication*. Hence reference will first be made to that adjudication.

(1) *Water Division No. 5 Adjudication*⁵

There is a grave paucity of facts before the Supreme Court in regard to the *Water Division No. 5 Adjudi-*

³APPENDIX, page 1, 43 U.S.C. 666.

⁴APPENDIX, page 13.

⁵*Water Division No. 5 Adjudication*: Justice Department recites that on February 11, 1970, a notice pursuant to the Colorado law was received by the Attorney General of the United States. Accompanying the notice was a résumé of recent applications to appropriate rights to the use of water in Water Division 5. The Attorney General was advised if he opposed the ap-

cation. There are no pleadings; no claims of rights; no assertion of conflicting claims; no case or controversy; no justiciable issue appears in the records before the Court for review. Doubt must be expressed from the status of the records in regard to the parties, if any, before the Supreme Court. It is stated in the Justice Department brief "We rely primarily on our brief submitted in *Eagle County* * * * No. 87, this Term * * *." Nevertheless only one of the Respondents in the *Eagle River Adjudication* filed a brief in *Water Division No. 5 Adjudication*.

(2) *Eagle River Adjudication*.⁶

As observed below, the runoff of the Eagle River annually entering the Colorado River far exceeds pres-

plications he should file "a verified statement of opposition." (Appendix, pp. 47 et seq.) In denying a motion to quash service (43 U.S.C. 66) filed by the Justice Department, the trial court stated it was bound by the above mentioned Colorado Supreme Court decision. (Appendix, pp. 50-51) That last mentioned court, based on its decision, denied a Justice Department Petition for a Writ of Prohibition. (Appendix, p. 52) The Justice Department brief in this adjudication to the Supreme Court incorporates by reference much of the *Eagle River Adjudication*. (Appendix, pp. 76, 78 et seq.) Only one of the Respondents from the *Eagle River Adjudication* filed a final brief in this adjudication. It was available for consideration February 16, 1971. (Appendix, pp. 86 et seq.)

⁶*Eagle River Adjudication*: Notice of Supplemental Proceedings of the *Eagle River Adjudication* was served upon the Attorney General; a Justice Department Motion to Dismiss for want of jurisdiction was denied (43 U.S.C. 666) (See APPENDIX, p. 1); a Justice Department Petition for a Writ of Prohibition to the Supreme Court of Colorado was denied by its above mentioned decision declaring the Colorado State court had jurisdiction of the rights of the United States. (Appendix, pp. 10 et seq., 12 et seq.) A Justice Department Petition to the Supreme Court for Certiorari to the Supreme Court of Colorado was granted. (Appendix, p. 19) Respondents describe the Eagle River as a substantial tributary of the Colorado River. Its annual runoff, say Respondents, after all depletions is "408,000 acre feet" entering the Colorado. (Appendix, p. 24 footnote 3). In contrast

(This footnote is continued on the next page)

ent uses. There is not a scintilla of evidence before the Supreme Court that now or ever will there be a conflict between the claims of the National Government, in the light of the huge available supply of water, with any other claims.

From the records, as stated, there are no conflicting rights, no pleadings indicating a conflict with the United States, no case or controversy, no justiciable issue to be resolved by the Supreme Court. Similar to the *Water Division No. 5 Adjudication*, the matter on review is moot. That status of the *Eagle River Adjudication* is not changed by the Justice Department's request, wholly without justification, for an advisory opinion by the Court.

Sua sponte dismissal by the Supreme Court on the basis of the records in these two adjudications should ensue. The United States is not a necessary party to either adjudication, all as will be fully reviewed.

(3) *Requests to Justice Department to advise Court of Indian interests in the Colorado River and tributaries within Colorado*

For many months the Justice Department has been aware of the vital interests of the American Indians

to the large unused annual runoff, claims of the United States are minuscule and from the record are not asserted to be in conflict with any one. (Appendix, pages 8 et seq.) A Respondent asserts an illusory, unperfected, inchoate 1966 paper claim in the Eagle River without asserting any means of perfecting that illusory paper claim (indeed, there is no indication it is empowered by law to develop the project) or any conflict with the United States which would make it a necessary party. (Appendix, p. 7) Other Respondents do not assert claims, only most vague references without alleging any conflict with the United States. (Appendix, p. 24, footnote 5).

An advisory opinion is sought to "reaffirm" principles of law unannounced only sixty years ago and recently "reaffirmed" by the Supreme Court, primarily in regard to Indian rights. (Appendix, pp. 22 et seq.)

in the *Eagle River Adjudication* and the *Water Division No. 5 Adjudication*. The Agua Caliente Band of Mission Indians at Palm Springs, California, on October 21, 1970, through their attorney, advised the Solicitor General of the perilous course, from the Indians' standpoint, that the Justice Department was following. Other Indians, for example, the Fort Mojave Tribe, likewise made demands upon the Solicitor General, asking that he bring to the Court's attention their vital interests. Other outstanding lawyers representing numerous tribal interests, joined in the request to the Solicitor General. Acknowledgment of the Agua Caliente and Fort Mojave interests by the Solicitor General is now a matter of record. There was also extended testimony presented to the Subcommittee on Indian Affairs in regard to the direct interests of the American Indians in the *Eagle River Adjudication*.⁷

On November 6, 1970, the Solicitor General advised the Indian Tribes, "Please be assured that the government intends to make the Supreme Court fully aware of its obligations as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights." As suggested in the letter from which the quoted excerpt is taken, the Attorney for the Agua Calientes and the Fort Mojave Tribe on November 28, 1970, reviewed and documented in detail the Indian interests in the *Eagle River Adjudication*.⁸ At that time the Petition for Certiorari in *Water Division No. 5 Adjudication* had not been granted.)

⁷APPENDIX, pages 53, 54-57; 59-75; 85; 40 et seq.

⁸APPENDIX, pages 63 et seq.; See also APPENDIX, page 73 in which Attorneys for the Arapahoe Tribe in Wyoming, Salish and Kootenai Tribes in Montana, Hoopa Valley Tribe in California, Quinault Tribe in Washington, Tribes in North Dakota, and the National Congress of American Indians, expressed their grave concern over the posture of that case.

(4) *Violation of assurance to Indians—Cryptic denial to Supreme Court by Justice Department of Indian interests*

January 14, 1971, is the date the Justice Department filed its brief in Water Division No. 5 Adjudication, in which it was to assert to the Supreme Court Indian rights and interests. It accorded to the Indians this cryptic footnote:

"To the best of our knowledge, none of the reserved water rights claimed the the United States in Water Division No. 5 relate to Indian lands,"⁹

That statement on its face is without meaning. Quite obviously rights to the use of water claimed for Forest Service and other lands withdrawn by the United States for the public at large would not "relate to Indian lands," which are private in character held in trust for the American Indians.¹⁰ That the footnote falls far short of reasonable action by the agents of the Trustee United States is abundantly manifest, all as will be reviewed in detail. The facts reviewed in this phase of the consideration gave rise to the request for this analysis and the authorization for it.¹¹

⁹APPENDIX, pages 76, 79, footnote 3—continuation from above quote— "In the event of this Court should rule that 43 U.S.C. 666 subjects federal reserved rights in general to state adjudication, there would remain the further question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public."

¹⁰See "Legal Principles Respecting American Indian Rights To The Use Of Water In General * * *" and related matters, *infra* pp. 37 et seq.

¹¹See APPENDIX, pages 82, 83, 84, 85.

- (c) *Justice Department conduct of the two adjudications before the Supreme Court and in the courts below threatens the American Indians in the Colorado River Basin and in all Western United States*

Denigration of the principles of law upon which the American Indian rights to the use of water are predicated is only one phase of the crucial aspects of the adjudications in question. Conduct by the Justice Department in those adjudications, if permitted to continue, can be equally devastating to the rights of the American Indians. Reference is made to Plate I attached to this consideration and Plate II which immediately follows this page. Particular reference is made to data set forth on those Plates, including pertinent quoted Colorado statutes, as they will aid in locating the areas involved in the proceedings before the Supreme Court and the Indian interests within the State of Colorado, the main stream of the Colorado River and the tributary streams within that State.¹²

¹²Plates I and II.

PLATE II.

COLORADO STATE WATER DIVISIONS ON FACING MAP INCLUDED IN THE SUPREME COURT OF THE UNITED STATES ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Water Division No. 5 Adjudication, October Term, 1970, No. 812:

Subject matter: Rights to the use of water in *Water Division No. 5 Adjudication*.

"Division 5: Division 5 shall consist of all lands in the State of Colorado in the drainage basins of the Colorado River and all of its tributaries arising within Colorado, with the exception of the Gunnison river; but for the purpose of sections 148-21-10 and 148-21-11 of this article the White river drainage basin shall be deemed a part of division 5." (Vol. 11 Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(6))

Eagle River Adjudication, October Term, 1970, No. 87:

Subject matter: Rights to the use of water in *Eagle River Adjudication*.

"The Eagle River is a substantial tributary of the Colorado River in Colorado. The mainstream is about 65 miles in length, and of numerous tributaries, some 17 totalling an additional 180 miles may be considered major water producers. The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions." (APPENDIX Page 24, footnote 3)

COLORADO STATE COURT PROCEEDINGS IMMEDIATELY INVOLVED BUT NOT DIRECTLY BEFORE THE SUPREME COURT:

"In addition, the Attorney General received similar résumé of applications filed in Water Divisions 4 and 6 during the month of December 1969." (Justice Department Brief, APPENDIX Page 48)

"Division 4: Division 4 shall consist of all lands in the state of Colorado in the drainage basins of the Gunnison river and all of its tributaries, the Little Dolores river, the San Miguel river, and that portion of the Dolores river and its tributaries north of the north township line of Township 45 North, New Mexico Principal Meridian." (Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(5))

"Division 6: Except as limited by subsection (6) of this section, division 6 shall consist of all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river, the North Platte river, and all of their tributaries." (Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(7))

INDIAN RESERVATIONS WITHIN PURVIEW OF CASES BEFORE SUPREME COURT: SOUTHERN UTE INDIAN RESERVATION; UTE MOUNTAIN INDIAN RESERVATION:

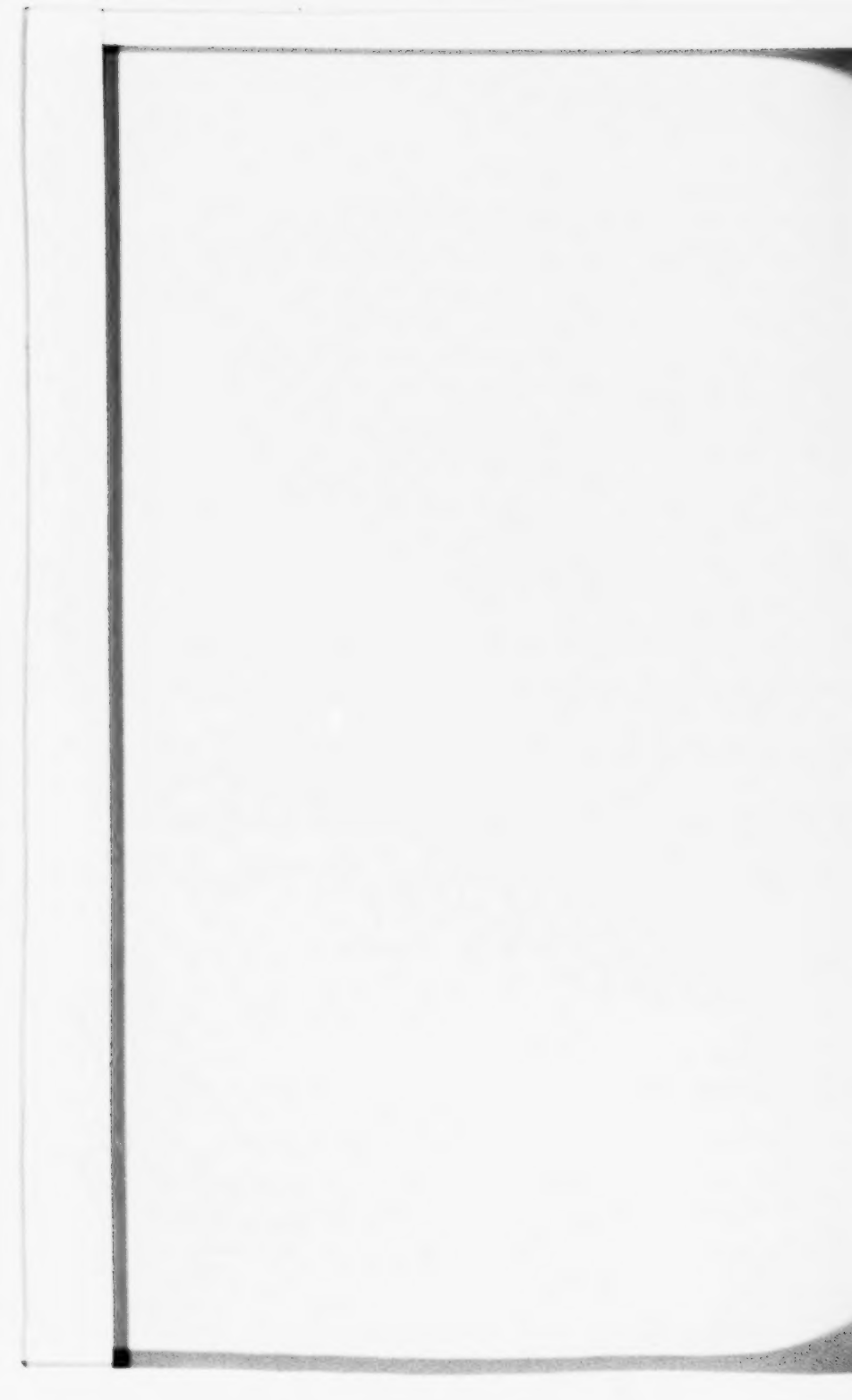
"Division 7: Division 7 shall consist of all lands located in the southwest corner of the state of Colorado and in the drainage basins of the San Juan river, Rio Piedra, Rio Las Animas, Los Pinos river, La Plata river, Rio Mancos and streams tributary to said rivers and creeks as well as that portion of the Dolores river and its tributaries lying south of the north line of Township 45 North, New Mexico Principal Meridian." (Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(8))



MAP OF A PORTION OF THE
STATE OF COLORADO
AND PORTIONS OF UTAH, ARIZONA AND NEW MEXICO
Showing
COLORADO EAGLE RIVER WATER DISTRICT NO. 37,
COLORADO WATER DIVISION NO. 5
And
CERTAIN OTHER WATER DIVISIONS
And
THE UTE MOUNTAIN, SOUTHERN UTE INDIAN RESERVATIONS,
IN COLORADO, And
INDIAN RESERVATIONS IN UTAH, NEW MEXICO AND ARIZONA

PLATE II

BUREAU OF INDIAN AFFAIRS
PHOENIX AREA OFFICE
J.H. JONES MAR 7, 1971



American Indians' rights and interests are inextricably inter-related to the decision of Colorado's highest court and the two adjudications to which this consideration is directed. Equally important to the American Indians is the course of conduct by the Justice Department in Colorado's courts in which the adjudications were initiated.

(1) Plate I discloses that five Indian Reservations have rights to the use of water in the main stream of the Colorado River and its tributaries within Colorado. Rights in that river are the subject matter of the *Water Division No. 5 Adjudication*;

(2) Plate I also discloses American Indians within Colorado have vested in them title to rights to the use of water;

(3) Plate I also discloses that American Indians have rights to the use of water in the Green River and its tributaries within the State of Colorado and in the San Juan and its tributaries within the State of Colorado—indeed, American Indians have rights in every tributary of the Colorado River which flows out of the State of Colorado;

(4) Due to their vital interests within Colorado, American Indians and Indian Tribes throughout the arid and semiarid West have just cause for gravest concern over the course of conduct of the Justice Department in these adjudications. For example:

(i) Justice Department in error states to the Supreme Court in the *Eagle River Adjudication*: "Reserved rights have been defined by this Court as the entitlement of the *United States to*

use as much water from sources on lands withdrawn from the public domain * * *.”¹³ As presented, that statement, reiterated and repeated throughout the Petitions for Certiorari and briefs filed by the Justice Department, is in total error and gravely trenches upon the principles of Indian law. Throughout the adjudications the Justice Department failed to distinguish between the Indian rights to the use of water which are private in character held in trust by the United States for the Indians, from the “public” rights—for example, those asserted for the Forest Service and Bureau of Land Management in both adjudications on review.¹⁴

(ii) Having failed correctly to state the law to the Supreme Court and to distinguish the American Indian rights held in trust for them by the United States, from the public rights, the Justice Department, without reason or justification, requests the Supreme Court in the pending cases “to reaffirm” the numerous decisions of that Court and others, which preserve and protect the Indians’ rights to the use of water. That request to reaffirm was made thought he principles in question were not challenged in the proceedings giving rise to the review by the Supreme Court.¹⁵

¹³APPENDIX, Pages 1, 2; See *infra*, page 66 “Denigration Before The Supreme Court of the American Indian Rights To The Use of Water * * *.”

¹⁴APPENDIX, pages 1, 2-3; 19, 20-21; See *infra*, page 37, “Legal Principles Respecting American Indian Rights To The Use Of Water In General * * *”, particularly page 61.

¹⁵APPENDIX, pages 19, 22; See *infra* page 66 “Denigration Before The Supreme Court of the American Indian Rights To The Use Of Water * * *.”

(iii) In total disregard of the rights of the Indians in the Colorado River and its tributaries, the Justice Department has offered—albeit cryptically—in clear violation of the American Indian rights to the use of water in the main stream of the Colorado River and its tributaries, voluntarily to “submit itself to the jurisdiction of” the State courts of Colorado for the adjudication, administration and control of its rights within the State of Colorado. Critical nature of that mindless proffer to submit the “reserved rights” of the United States is abundantly manifest when it is recognized that the Justice Department fails throughout the adjudications to distinguish Federal rights from Indian rights.¹⁶

(iv) American Indians’ rights to the use of water are further imperiled by another cryptic announcement to the Colorado courts and to the Supreme Court by the Justice Department. That Department says this in regard to the Act of Congress which Colorado’s Supreme Court has interpreted as submitting all of the rights of the National Government to State court jurisdiction for adjudication, control and administration: “Since the United States has water rights throughout entire river systems, such as

¹⁶APPENDIX, pages 10, 11 second full paragraph, 12, 14, where a proffer was made to Colorado’s highest court. It will be observed that the Colorado Supreme Court declared it had jurisdiction and outlined the *modus operandi* where the “reserved rights”—omitting entirely Indian rights—could be allegedly protected. (See APPENDIX, Pages 16 and 17 on which the breadth of the jurisdiction of Colorado’s district courts is reviewed in some detail).

the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread.”¹⁷ Continuing to imperil the basin-wide rights of the American Indians, the Justice Department tacitly agrees to subject the rights of the United States—without distinguishing the Indian rights—to the jurisdiction of the State courts of Colorado for adjudication, control and administration. It says this to the Highest Court and to the Colorado courts: “* * * where a river system traverses the boundaries of a single State, the United States should not, we submit, be required to assert its rights in any proceeding that is less than statewide in character.”¹⁸ Reference is made to Plate I in connection with that tacit offer to accept State court control. From that Plate will be observed the Indian Reservations to which that tacit offer made by the Justice Department to submit the United States to jurisdiction, adjudication, control and administration of State law, might well be applicable. Reference is also made to Plate II disclosing the number of rivers in which the Indians have rights to the use of water, which might well come within that wholly unauthorized offer by the Justice Department. That proffer by Justice to compromise the express language of the Congress in the waiver of immunity from suit,¹⁹ should not be accepted by the Indians, or indeed by the United

¹⁷APPENDIX, pages 1, 5, 6, 22-23.

¹⁸APPENDIX, Page 23.

¹⁹APPENDIX, Pages 1, 2.

States, particularly in view of the Supreme Court of Colorado's interpretation of that Congressional Act.²⁰

Tacitly to agree, as does the Justice Department, that the Congress under the circumstances where “* * * the United States has water rights throughout entire river systems, such as the Colorado River, * * *” submitted the Nation's rights to the use of water to State control and administration on those interstate streams, for the reach of the river within each single State, is violative of the language of the statute²¹ and of the cases applying that express language.²² In the analysis of the Indian rights within the State of Colorado itself, on the main stream and tributaries of the Colorado River outside of Colorado, the impact of the Justice Department's departure from the express language of 43 U.S.C. 666 becomes abundantly apparent.

²⁰APPENDIX, Pages 12, 13, 14, 15: “We are not determining whether the United States has reserved rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn.”

²¹APPENDIX, Page 1. “* * * Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source * * *” 43 U.S.C. 666. No power is there vested in the Justice Department to have the Nation's rights in one State subjected to the jurisdiction, control and administration in that one State, in disregard of its rights downstream.

²²APPENDIX, Page 79. *Miller et al. v. Jennings*, 243 F.2d 157, 159 (C.A.5, 1957); *Cert. denied* 355 U.S. 827 (1958); (There the United States District Court for the Western District of Texas declared it was without jurisdiction by reason of the fact it did not have before it all parties having rights in the Rio Grande)—*Dugan v. Rank*, 372 U.S. 609, 617-618 (1963); See 293 F.2d 340.

- (d) *Justice Department's almost total reliance on Indian law, and other conduct in these adjudications inexorably resulted in the Colorado courts, the Respondents, amici curiae, proceeding on the basis that the Indian rights and their precedents respecting those rights are before the Court for review*

Reference will be made to almost total reliance upon Indian law by the Justice Department in its contention respecting the "reserved rights of the United States."²³ Respondents urge—in total error—that the United States must go back to Colorado's State district court for a determination of all claims—including Indian rights: "At least one reason for the need for such a determination is that most and possibly all reserved rights claimed to exist must be implied if they are to be found at all, * * *." Continuing, Respondents refer specifically to Indian rights as follows: "This Court found in *Arizona v. California*, 373 U.S. 546 that the reserved rights claimed for Indian Reservations had to be implied (at 599), as had been the case in *Winters v. United States*."²⁴ In an extensive review Respondents

²³See footnote 172, *infra* p. 73.

²⁴APPENDIX, Pages 24, 26. Note: In error the Respondents fail to distinguish between the *Winters Decision* and *Arizona v. California*. In the *Winters Decision* the Indians were grantors under the agreement of May, 1888, to the United States, grantee under that agreement. As the Supreme Court states in *Winters*: "The case, as we view it, turns on the agreement of May, 1888 * * *." (207 U.S. 564, 575-576 (1908)) Though no mention was made in that Indian granting agreement to the United States that the Indians retained rights to the use of water in the Milk River, the Supreme Court nevertheless declares that those rights were retained by the Indians, were not granted. Based on that implied reservation by the Indians for themselves, the Court states the admission by the United States of Montana into the Union did not destroy the rights retained by the Indians.

In *Arizona v. California* the converse was true with the Nation granting to the Indians and reserving for them in the grant,

discuss in detail Indian rights which are, of course, virtually the only rights in the cases cited under the so-called "reservation theory".

Amicus Curiae briefs of States with large Indian populations, relying heavily upon the *Winters Doctrine*, have been filed.²⁵ They include: Colorado, Oregon, Nevada, Idaho, Montana and Alaska,²⁶ Arizona,²⁷ Utah,²⁸ California,²⁹ Oklahoma,³⁰ Washington³¹ and Wyoming.³² Washington and Wyoming in their Amicus Curiae briefs specifically allude to Indian *Winters Doctrine* rights. Complex questions of Indian rights to the use of water are directly and immediately presented in many of the other State briefs.

It is manifest that the Colorado decision before the Supreme Court for review—in error—makes no distinction between Indian rights and the public rights of the Nation.³³

In the light of all the facts and principles of law reviewed above, it is here reiterated that the Justice Department's failure to make the distinction between the private rights of the Indians, held in trust for them by the United States, and the federal public rights

rights to the use of water in the main stream of the Colorado River sufficient to meet the present and future water requirements of those Reservations, to make habitable their lands, all as decreed by the Supreme Court of the United States, 373 U.S. 546, 595-600 (1963). See Plate I.

²⁵APPENDIX, Pages 30 et seq.

²⁶APPENDIX, Page 30.

²⁷APPENDIX, Page 32.

²⁸APPENDIX, Page 35.

²⁹APPENDIX, Page 36.

³⁰APPENDIX, Page 37.

³¹APPENDIX, Page 38.

³²APPENDIX, Page 39.

³³APPENDIX Pages 12, 14, 15, 17.

can only be considered frivolous in the extreme. Failure to make that distinction and thus subject the Indian rights to the threat of State law, control and administration, is a disaster of the first magnitude to the American Indians.

(e) *References to American Indian rights to the use of water in the Colorado River and its tributaries*

Interests of the American Indians in the main stream of the Colorado River and its tributaries are graphically displayed by Plate I as it relates to the issues pending before the Court. That map of the drainage area of the Colorado River should be considered in the light of Colorado's Supreme Court decision now on review. In that State court decision, adhering to the Justice Department concepts as advanced to it and the Supreme Court, no distinction is made between the Indian rights to the use of water held in trust for the benefit of them, and the federal rights for public purposes. With specific reference to *Winters* and other Indian decisions, Colorado's State court under the heading "Reserved Rights" says this:

"Winters v. United States, supra, [458 P.2d 770] involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union 'upon an equal footing with the original States' (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union.

* * *

"We are not determining whether the United States has reserved water rights in connection with

lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."³⁴

Two aspects crucial to the Indians are created by that explicit ruling of Colorado's Supreme Court, which the Justice Department—if its cryptic statement means anything³⁵—without success, seeks to ignore: (1) Under Colorado laws Indian rights are within the purview of its statewide statutes and decisions (2) Indian rights are within the nationwide purview of the alleged waiver by the Congress of immunity from suit as the issues are presented in the *Eagle River Adjudication* and *Water Division No. 5 Adjudication*.

- (1) *San Juan River Drainage, State of Colorado*
- (i) *Southern Ute and Ute Mountain Indian Reservations*

Plate I and Plate II set forth the drainage area of the San Juan River. It is a principal tributary of the main stream of the Colorado River. It is an interstate stream and has its sources in New Mexico and Colorado. The main stream of the San Juan intersects both the Southern Ute and the Ute Mountain Indian Reservations within the State of Colorado. It will be observed that both Reservations are intersected by several tributaries of the San Juan rising in the State of Colorado.

There has never been a determination by the United States Trustee—or otherwise—of the present and future

³⁴APPENDIX, Pages 12, 14, 15.

³⁵See above, page 8, footnote 16.

water requirements of the Southern Ute or Ute Mountain Indian Reservations in either the main stream of the San Juan River or the tributaries of that stream. Present arrangements in regard to some of the water sources for the Reservations have been made but are not complete nor the import of them fully known. They are now under study.

(ii) *San Juan River Drainage—Colorado's Water Division No. 7*

Colorado's Water Division No. 7 includes "the drainage basins of the San Juan River, Rio Piedra, Rio Las Animas, Los Pinos River, La Plata River, Rio Mancos, and streams tributary to said rivers and creeks as well as * * *" portions of the Dolores River.⁸⁶ Fear of loss by the Southern Ute Tribe of their invaluable *Winters Doctrine* rights to the use of water is a matter of public record.⁸⁷

Application of the laws of Colorado to the Indians' rights either by a judicial declaration in the adjudications in question or the Justice Department policy declarations,⁸⁸ presents to the Indians the gravest threat to them since the pronouncement of the *Winters Decision* in 1908.⁸⁹ Full import of the control by Colorado of Indian rights to the use of water, if that comes to pass, is succinctly stated in these terms:

"148-21-17. Administration and distribution of waters.—(1) The state engineer shall be respon-

⁸⁶11 Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(8).

⁸⁷Memorandum April 9, 1970 to Chairman, Governor or President All Indian Tribes in the Eleven Western States from the Chairman, Southern Ute Tribal Council;

Letter March 31, 1970 to Congressman Wayne N. Aspinall.

⁸⁸See above, pages 7 and 8.

⁸⁹*Winters v. United States*, 207 U.S. 564 (1908).

sible for the administration and distribution of the waters of the state, and in each division such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

“(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on the effective date of this article and by the priorities for water rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of water of the state.”⁴⁰

It is, of course, elemental that State police regulation over Indian rights to the use of water by Colorado's state engineer is tantamount to control of life on those arid Reservations. Regarding Indian lands in the Colorado River Basin the Supreme Court points up very well in these terms the Indian crisis in these cases:

“* * * the lands were of the desert kind—hot, scorching sands—and that water from the [Colorado] river would be essential to the life of the Indian people * * *.”⁴¹

When the Highest Court thus recently “reaffirmed” the *Winters Doctrine*—Justice Department wants an-

⁴⁰APPENDIX, Page 86.

⁴¹Arizona v. California, 373 U.S. 546, 599 (1963).

other reaffirmance—the Court was paraphrasing its earlier statement made in 1908 which is as follows:

“The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians [grantors] and deliberately accepted by the Government [grantee]. * * * Did they [the Indians] give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? * * * If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians.”⁴²

(2) *San Juan River Reservations Outside of the State of Colorado—Navajo and Jicarilla-Apache*

Plate I and Plate II again are keys to American Indian interests outside of Colorado in the Supreme Court decision from that State, the Justice Department's conduct of the matter and the basic assault upon Indian law respecting their rights to the use of water which is referred to by the Justice Department as “reserved water rights of the United States.”

Crucial to the Navajo Indian Reservation in the States of New Mexico, Arizona and Utah, is this fact:

The main stream of the San Juan River traverses the northeast corner of the vast and arid Navajo Indian Reservation in the State of New Mexico,

⁴²Winters v. United States, 207 U.S. 564, 575-576 (1908).

and the southeastern corner of Utah, constituting the northern boundary of the Navajo Reservation in that State for its entire length after that river leaves the Ute Mountain Reservation in the State of Colorado, and courses almost due west to its confluence with the Colorado River in the States of Utah.

Crucial likewise to the Jicarilla-Apache Reservation in New Mexico is this fact:

Substantial quantities of water in the San Juan River arise upon and flow into that River from that Reservation.

American Indians in the San Juan River Drainage occupying four Reservations in four States are vitally and directly involved in the proceedings before the Supreme Court in regard to

(i) Their titles to rights to the use of water in the main stream and the tributaries of the San Juan River;

(ii) The crucial issues presented by the Colorado Supreme Court's seeming avoidance—albeit in error—of the principles of the *Winters Doctrine* upon which the very existence of the four Reservations is predicated;

(iii) The anomalous request of the Justice Department for a reaffirmance of the *Winters Doctrine*—the “reservation theory”—which was “reaffirmed” as recently as 1963 after years of application;

(iv) The threat that their rights to the use of water will be subjected to the police regulations of the four States, pursuant to which the States

administer, adjudicate, and control those rights coming within their respective jurisdictions;

(v) Policy propositions proffered by the Justice Department to the Colorado courts, all as reviewed above.

Total inadequacy of the Justice Department's cryptic footnote to the Highest Court about "no knowledge" of Indian rights and interests is abundantly manifested and underscored as the facts and the law are analyzed.

(3) *Green River, White River, Yampa River, Tributaries of the main stream of the Colorado River Uintah and Ouray Indian Reservation—State of Utah*

Plate I and Plate II disclose the principal sources of water for the Uintah and Ouray Indian Reservation in the State of Utah. It will be observed that the Green River, a major tributary of the Colorado River, and the White River traverse that Reservation. Those facts are of great importance here for the Justice Department in its brief makes this statement to the Highest Court:

"In addition [to purported service in Water Division No. 5] the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1969."⁴³

Reference is first made to Colorado's Water Division No. 6. It is described as follows:

"* * * all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river * * *, and all of their tributaries."⁴⁴

⁴³APPENDIX, Pages 47-48.

⁴⁴Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(7).

Similar to the Navajo Reservation in New Mexico, Arizona and Utah, the Uintah and Ouray Reservation is almost wholly reliant upon the rivers in the State of Colorado which are directly or implicitly before the Supreme Court in the *Eagle River and Water Division No. 5 Adjudications*. That Reservation is equally threatened by Colorado's Supreme Court decision, the interpretation of 43 U.S.C. 666, and the course of conduct adopted by the Justice Department throughout the entire proceedings in the Supreme Court.⁴⁵

- (4) *American Indian rights to the use of water in main stream of the Colorado River and its tributaries within the State of Colorado*

(i) *Water Division No. 5 Adjudication*

Magnitude of the importance of the two adjudications before the Supreme Court can readily be observed from Plates I and II when read in the light of the law of the Colorado River of which the Colorado State police regulations respecting rights to the use of water have significance, but far from dominance. Justice Department's presentation to the Supreme Court in its Petition for Certiorari and its briefs filed with the Supreme Court respecting the *Water Division No. 5 Adjudication*, say this: Colorado's "Water Division 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), which also includes the former Water Division No. 37 in the *Eagle County* case", referred to here as the *Eagle River Adjudication*.⁴⁶ Succinctly, there is before the Supreme Court of the United States a decision of Colorado's highest

⁴⁵See above, pages 16 through 17 in regard to the San Juan River Drainage, Colorado's Water Division No. 7.

⁴⁶APPENDIX, Pages 47, 48, 76, 77-78.

court, the *Eagle River Adjudication* and the *Water Division No. 5 Adjudication*, the primary water source for the main stream of the Colorado River throughout its vast drainage. At issue is whether the courts of Colorado in the exercise of its police power, have jurisdiction and control over all of the rights of the National Government: “* * * in the drainage basins of the Colorado River and all of its tributaries arising within Colorado”,⁴⁷ with the exception of the Gunnison River which is likewise involved in another proceeding and will, of course, be subject to the Colorado decision in the absence of its reversal.

(ii) *Eagle River Adjudication*

In regard to the vast area and the water supply for the Entire Colorado River Basin, is this statement respecting the *Eagle River Adjudication* which under present Colorado law, is included in *Water Division No. 5*:

“The Eagle River is a substantial tributary of the Colorado River in Colorado.* * * The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions.”⁴⁸

In the analysis of the discharge of the Colorado River and its tributaries at the State line the importance of the huge quantities of water produced by the Colorado River within the State of Colorado—including the Eagle River—will be emphasized. Reference is again made to the brief of the Justice Department from

⁴⁷Vol. 11 Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(6).

⁴⁸APPENDIX, Page 24, footnote 3.

which there is quoted the statement, "In addition, the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1966."⁴⁹ The import of Water Division No. 6 was alluded to above. Comment is now made respecting Water Division No. 4.

(iii) *Water Division No. 4*

It is provided under the Colorado law that Water Division No. 4 encompasses "* * * the drainage basins of the Gunnison River and all that portion of the Dolores River and its tributaries north of the north township line of Township 45 North, New Mexico Principal Meridian."⁵⁰ Plate I and Plate II locate the Gunnison River which enters the Colorado River within the State of Colorado. It will be noted from those Plates that the Dolores River joins the Colorado in the State of Utah shortly after it crosses the common boundary of the State last mentioned and the State of Colorado.

(iv) *Supreme Court decreed rights to American Indians in the main stream of the Colorado River*

It has been emphasized above that the Supreme Court of the United States is fully cognizant that the Indian Reservations on the main stream of the Colorado River are not habitable without water from that stream.⁵¹ That Court likewise stated that the Indians have rights to the use of water sufficient "to satisfy the future as well as the present needs * * *" of those

⁴⁹APPENDIX, Pages 47, 48.

⁵⁰11 Colorado Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(5).

⁵¹Arizona v. California, 373 U.S. 546, 598-599 (1963).

Indian Reservations. It measured those rights on the basis of water requirements adequate "to irrigate all the practicable irrigable acreage on the reservations."⁵²

In keeping with that decision the Supreme Court "*** * * Ordered, Adjudged and Decreed**" Indian rights to the use of water on the main stream of the Colorado for the Chemehuevi Indian Reservation, the Cocopah Indian Reservation, the Yuma Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation.⁵³ Please refer to the facing page

⁵²Arizona v. California, 373 U.S. 546, 600 (1963).

⁵³Arizona v. California, 373 U.S. 546 (1963):

**"IT IS ORDERED, ADJUDGED AND DECREED THAT
I For purposes of this decree:**

*** * ***

"(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

"(2) The Cocopah Indian Reservation in annual quantities not exceed (i) 2,744 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

"(3) The Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

"(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1875, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November

of Plate I which tabulates the rights on the main stream of the Colorado River the Supreme Court decreed to the named Reservations.

Set forth above and graphically displayed on Plate I and Plate II are the American Indian interests in the main stream of the Colorado River and the tributaries of that stream within the State of Colorado. On the basis of those geographical aspects of this consideration reference will next be made to the equally important hydrological phenomena of the Colorado River and its tributaries.

(f) Seventy percent (70%) of all of the waters in the main stream of the Colorado River available to the Indian Reservations, the rights of which are decreed by the Supreme Court, are within the issues presented to that Court

Error in the Justice Department's denial of Indian interests in the issues now on review before the Supreme Court is evidenced by this statement by that Court:

"The Colorado River itself rises in the mountains of Colorado and flows generally in a south-

22, 1915, for lands reserved by the Executive Order of said date;

"(5) The Fort Mohave Indian Reservation in annual quantities not to exceed (i) 122,648 acre-feet of diversions from the main-stream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and, subject to the next succeeding proviso, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp Land Act [9 Stat. 519 (1850)] as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292), shall not be included as irrigable

(This footnote is continued on the next page)

westerly direction for about 1300 miles * * * The river and its tributaries flow in a natural basin almost surrounded by large mountain ranges and drain 242,000 square miles * * * Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable. * * * 2000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix * * *

American Indians were practicing irrigation in that region at the time white men first explored it.”⁵⁴

Dating back to antiquity, and in 1858 when Lieutenant Ives made his historic trip up the main stream of the Colorado River, American Indians were likewise dependent upon the Colorado River to irrigate their crops. Indeed, the Mojaves and others were wholly dependent upon the Nile-like inundation of the Colorado River to irrigate their crops at the time and long prior to when Ives visited them in the year last mentioned.⁵⁵ Emphasis is placed upon the fact that the rights decreed to the Mojaves and others by the Supreme Court over 100 years after Ives, relate to the

acreage within the Reservation and that the above specified diversion requirement shall be reduced by 6.4 acre-feet per acre of such land that is irrigable; provided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined; * * *.”

⁵⁴Arizona v. California, 373 U.S. 546, 552 (1963).

⁵⁵Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Congress, 1st Session, * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, p. 467.

identical lands occupied by those Indians in ancient times.⁵⁶

Historically and today the Indians on the main stream of the Colorado River holding rights decreed to them by the Supreme Court are wholly dependent upon the waters which have their sources in the drainage area embraced within *Water Division No. 5 Adjudication* which, as stated, includes the drainage area within the *Eagle River Adjudication*; to a lesser extent in Water Division No. 4, No. 6, and No. 7, all of which have been alluded to above and are set forth on Plate No. II.

Under the heading "Average Annual Historic Flows at State Lines * * *" the Upper Colorado River Commission reports:⁵⁷

	Historic Flow at State Lines Acre-feet	* * *	Historic Contribution to Flow at Lee Ferry Acre Feet % of total
* * *			
Colorado	10,408,400	* * *	72.18

⁵⁶See Plate I and facing page.

⁵⁷Upper Colorado River Commission, First Annual Report, March 20, 1950; p. 7-9—*Note*: Flows of the main stream of the Colorado River and its tributaries are set forth in that report. That digest of flows at the Colorado State line is most instructive in regard to the San Juan River, White, Yampa and other rivers alluded to above, vital to the Navajo Indian Reservation, Uintah and Ouray and others. For other analysis of the flows and sources of water for the Colorado River, see *Arizona v. California*, Special Master's Report December 5, 1960, VII. Mainstream Supply pages 99 et seq.; 109 et seq.; C. Tables, p. 115 et seq.

For More current confirmatory data, see Water Resources of the upper Colorado River Basin,—Basic Data—U.S. Department of the Interior, Geological Survey Professional Paper 442—Text and Plates.

Relating geography of the Colorado River Basin to the hydrology of that Basin this fact is manifest:

70% of all of the water upon which the American Indians in the Colorado River Basin are dependent for their existence, arises within the State of Colorado and is a vital issue before the Supreme Court of the United States—belying the Justice Department's cryptic denial of Indian interests.

Equally important to this consideration is this authoritative, long-standing statement:

"Ninety-one percent of the water of the entire watershed has its origin in the mountains of Colorado, Wyoming, and Utah and not more than six percent comes from Nevada, Arizona, and California. * * *.⁵⁸

Vital to the Colorado River main stream American Indians with rights decreed to them by the Supreme Court is this statement:

"Ninety-four percent, therefore, of the water that passes Yuma originates above the Arizona-Utah line. * * * Nearly one thousand miles of canyon separate the lands upon which water may be beneficially applied in the upper basin from the lands upon which water may be beneficially used in the lower basin"—the five American Indian Reservations to which rights have been decreed are encompassed in that statement.

By reference to Plate I the States in the Upper Basin and the Lower Basin may be determined. Lee Ferry, point of division between the Basin's segments, is set

⁵⁸The Hoover Dam Documents, Wilbur and Ely, 1948, p. A64.

forth on that Plate, being located immediately south of the common boundary between Utah and Arizona.

(g) *Environmental crisis envelops Colorado River Basin—American Indians are first victims of it*

An environmental crisis—largely contrived by man—envelops the Colorado River Basin today. Undoubtedly the Highest Court will take judicial cognizance of that ecological debacle. It is a National disaster. There are two primary aspects of it, (1) A water shortage, as related to demands; (2) Pollution of the Colorado River water, likewise markedly attributable to Federal reclamation projects or Federally subsidized projects. Reference will be made to the water shortage within the Colorado River Basin.

(1) *Acute water shortage in Colorado River Basin
—a National disaster*

Catastrophic conditions prevail in the Colorado River Basin due to projects having been construed far beyond the available supply of water. American Indians within the Basin are probably the first victims of this mindless irresponsibility. Unquestionably judicial cognizance of this induced ecological debacle will be taken by the Highest Court. That crisis on the Colorado underscores the frivolous approach taken by the Justice Department in response to the urgent requests of the Indians, all as has been reviewed above.⁵⁹

In regard to the imperative need for the Supreme Court to take judicial notice of the environmental crisis is recent Congressional⁶⁰ and Executive action

⁵⁹See *supra*, pages 2 et seq.

⁶⁰Colorado River Basin Project Act, P.L. 90-537, Act of September 30, 1968, Sec. 201.

taken in regard to it.⁶¹ Reports in regard to the Colorado River Basin Project Act, having discussed further investigating respecting the crisis on the Colorado River, now implicitly before the Supreme Court, say this, among other things: “* * * the Secretary [of the Interior] can then proceed with investigations to determine the most economical means of augmenting the water supply of the Colorado River in order to serve the most critical water-short area of our Nation.”⁶² That quoted excerpt from a Congressional report, in blandest terms, describes most critical prevailing conditions throughout the Colorado River Basin. Other Congressional comments are more explicit respecting the planned destruction of the Colorado River and its implications for the politically weak American Indians in the Colorado River Basin:

“2. All of the studies indicate the presence of a serious water deficiency in the lower basin of the Colorado River; in fact, they show that a real crisis is being faced by Arizona, southern California, and Nevada. Furthermore, this same crisis is coming closer and closer to the upper basin with each passing year; therefore, the fundamental issue facing the Congress involves the question of the water supply deficiency of the entire Colorado River Basin.”⁶³

There is nothing new in the recognition that the yield of the Colorado River was far short of the planned

⁶¹See Western U.S. Water Plan, Federal-State Meeting, Denver, Colorado September 30—October 1, 1970; and Western U.S. Water Plan, Plan of Study, draft for review February 5, 1971.

⁶²Western U.S. Water Plan, Plan of Study, Draft for Review, February 5, 1971 P. II-3.

⁶³House Report 1849, 89th Congress, 2d Session, “The Committee’s Conclusions on Water Supply” page 34.

demands being placed upon it by Federal projects. These bleak statistics of the long-existing, now accentuating, catastrophic effects of over-building of the Colorado River are reflective of that fact.

"Over the years since the gages were installed at Lee Ferry in 1922 [pursuant to the Colorado River Compact], about 45 years ago, the 'virgin flow' at Lee Ferry, if there had been no depletions at all in the Upper Basin, would have averaged only 13.8 million acre feet annually. There is no dispute about this figure."⁸⁴

That figure must be contrasted with the total apportionment between the Upper and Lower Basins of 16,000,000 acre-feet annually.⁸⁵

"The Colorado is the world's most overworked river. So completely does man control this stream that it leaves the U.S. here at Yuma [California] as little more than a trickle. [See Plate I]

* * *

"Use and reuse of the Colorado's waters as it flows to the sea have pushed its salt content above federal standards for drinking. Salt also is damaging crops grown on land irrigated by the Colorado in California and Arizona."⁸⁶

To meet the crisis it is suggested that the appropriate course to pursue is to "lay another river down" in

⁸⁴Report on Central Arizona Project, Minority and Individual views, 90th Congress, 1st Session, Senate Report No. 408, page 89.

⁸⁵Colorado River Compact, Article III. The Hoover Dam Documents, Wilbur and Ely, 1948, A19; See also P. 25 for comments on allocation.

⁸⁶U.S. News & World Report, March 31, 1969.

the Colorado Basin * * *.”⁶⁷ Congress, reflecting the concern of the Columbia River Basin contingent, made short shrift of laying down another river, using the Columbia River water, in the Colorado Basin in the foreseeable future.⁶⁸ Acute nature of the water shortage in the Colorado River Basin is the immediate cause of pollution of the Colorado River.

(2) *Pollution of the Colorado River—an immediate irreparable loss to American Indians*

Pollution of the Colorado River due to high salinity is an immediate irreparable damage to the American Indian Reservations, particularly those Reservations with rights decreed to them in the main stream of the Colorado River by the Supreme Court.⁶⁹ Most recently it has been officially reported that salinity in that reach of the Colorado River constitutes a “Severe Problem In Some Areas Or Major Problem in Many Areas.”⁷⁰

It is the highly regarded United States Geological Survey that firmly established the fact that the pollution crisis on the Colorado River stems from the construction of highly subsidized Colorado River Basin projects and those for transmountain diversions. In a 1969 publication entitled “Lower Colorado River Water Supply—Its Magnitude and Distribution”,⁷¹ it is stated: “The principal components of the man-caused

⁶⁷Id. at p. 86.

⁶⁸“* * * for a period of ten years from the date of this Act, the Secretary shall not undertake reconnaissance studies of any plan for the importation of water into the Colorado River Basin * * *.” P.L. 90-537 Act of September 30, 1968, Sec. 201.

⁶⁹See Plate I.

⁷⁰Western U.S. Water Plan, W. Don Maughan, Water Resources Council Item 3, attachment.

⁷¹Geological Survey Professional Paper 486-D, page D 12.

depletion are (a) evapotranspiration resulting from irrigation or other uses within the drainage basin, (b) diversions to areas outside the basin, and (c) evaporation from reservoirs."⁷²

⁷²Evapotranspiration has been defined in regard to irrigation as follows: "Much irrigation water is lost by evaporation from soil and water and water surfaces or is transpired by plants. These processes in combination are called consumptive use or evapotranspiration." (Encyclopedia of Science and Technology, McGraw-Hill, vol. 7, page 270.) It is stated that the irrigated acreage within the Colorado River valley increased from 1,020,000 in 1910 to 1,425,000 acres in 1960. Immediate result of plant use of water has been described as follows: "Irrigation increases concentration of dissolved mineral matter, or use the plants consume a large part of the water applied but only a small part of the salts. Also, mineral fertilizers and soil minerals are carried off in solution in the return water." (Arizona Water, Geological Survey Water Supply Paper No. 1648, 1966, page 12.)

In discussing another "man-caused depletion" of the Colorado River the Geological Survey states: "Water exports [from the Colorado River Basin] increased from relatively insignificant amounts prior to 1905 to more than 500,000 acre-feet in 1960." (Lower Colorado River Water Supply—Its Magnitude and Distribution, Geological Survey Professional Paper 486-D.)

In "MAN . . . an endangered species?" (United States Department of the Interior Conservation Year Book No. 4, page 57) those depletions from the Colorado valley are euphoniously described as "Taking Water Through the Mountains." Those takings occur in the upper reaches of the Colorado River and its tributaries which constitute the prime source of the water so essential to the continued existence of the Indian Reservations in that basin—indeed to all other users of Colorado River water.

Also taken from "MAN . . . an endangered species?" are references to the Bureau of Reclamation's Fryingpan-Arkansas Project "to divert Colorado River water into the Arkansas River drainage"; and to the San Juan-Chama Project, to divert Colorado water for irrigation in the Rio Grande River Basin and for municipal supplied for Albuquerque."

Final "man-caused" depletion of the Colorado River, as stated above, is evaporation losses from the numerous reservoirs constructed in that river. It is reported that from Lake Mead—one the evaporation loss "was about 90 inches per year from this reservoir surface. The volume of water evaporated was about 800,000 acre-feet. (Arizona Water, Geological Survey Water Supply Paper No. 1648, 1966, page 5.)

(This footnote is continued on the next page)

As a shadow follows the substance, "man-ca depletions have resulted in the quality of the Colorado River deteriorating beyond the point of grave danger. Keeping in the foreground the fact, as reviewed below, that 500 parts per million of solids has been established as the minimal qualify for drinking water by the Public Health Service, a review of the progress of pollution that exists in the Colorado River is alarming. Studies by the United States Geological Survey reveal that at Lee Ferry where the Colorado enters the Lower Basin, the weighted average of solids was found in the year 1967 to be 601 parts per

Continuing in regard to this type of loss, the last cited author declares, "Evaporation from other reservoirs on the Colorado River, from the channel of the river itself, and other reservoirs within Arizona, amounts to more than 500,000 acre-feet per year."

In addition to the great evaporation loss from Lake Mead has been estimated—very roughly—that in the Upper Basin of the Colorado River there will be reservoir losses between 600,000 and 700,000 acre-feet annually. (Report on Central Arizona Project, Minority and Individual views, 90th Cong. 1st Sess. Senate Report No. 408, page 89. See also earlier report on Lower Colorado River Basin Project, hearing before the Subcommittee on Conservation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives, 89th Congress, 1st Session, H. R. 4671 and similar bills, page 557.) Thus, conservatively calculated, the evaporation losses from the reservoirs on the Colorado River total roughly 2,000,000 acre-feet annually.

⁷³In the year 1962 the United States Department of Health, Education and Welfare established standards for potable water. Among other things that Federal agency declared: "Drinking water shall not contain impurities in concentrations which may be hazardous to the health of the consumer." Straight-facedly it adds that drinking water "shall not be excessively corrosive to the water supply system." Criteria were then established in the following terms: "The following chemical substances should not be present in a water supply in excess of the listed concentrations * *

"Total dissolved solids [salts] * * * 500" parts per million (Public Health Service Drinking Water Standards 1962, page 10). *Note.* "The dissolved minerals in water commonly are called salts. This term is used in a chemical sense, however; it does not imply that all these minerals are salts in the ordinary sense, such as table salt (sodium chloride)."

lion.⁷⁴ Proceeding downstream, near Grand Canyon, Arizona, the water quality disclosed an increase in salts, weighted average 663 parts per million.⁷⁵ Pollutants flow into the Colorado River from all sides. Salts in the Virgin River, a main stream tributary, when tested had a weighted average of 1780 parts per million.⁷⁶

At each point of measurement on the main stem of the Colorado River the pattern of increased contamination continues. Immediately above the Fort Mojave Indian Reservation in Arizona and California the salts in the river range up to 700 parts per million; at the Colorado River Indian Reservation below Parker, Arizona, they are well above 700.

Finally, at the Yuma Indian Reservation, a lateral from the gargantuan All-American Canal which supplies the Imperial Valley with irrigation water, the weighted average of salts was 848 parts per million at the time of the testing.⁷⁷

Those statistics are not new nor prosaic to California. For the waters of the Colorado River underlie the vast economy of Southern California. Destroy the supply of Colorado River water and the destruction of that immense economy necessarily follows. On September 18, 1969, under this headline "Rising Salinity of Colorado River Called Ominous" a debacle - albeit "man-caused"-is described.⁷⁸ It is then followed by this statement, truly ominous: "Entire Crops May Be Phased Out in 2 Areas, Water Control Unit Told."

⁷⁴Water Resources Data For Arizona, Part 2, Water Quality Records, page 14.

⁷⁵Id., page 32.

⁷⁶Id., page 40.

⁷⁷Id., page 83.

⁷⁸Los Angeles Times, September 18, 1969.

Following those statements State and Federal officials reviewed in lay terms a grave threat to one of the world's great sources of food supply. At Imperial Dam—head-works for the All-American Canal referred to above, it is stated: “* * * the river's salinity, now standing at an average of 850 parts of dissolved solids per million parts of water at Imperial Dam, would rise to 1,300 parts per million shortly after the year 2,000.” The report continues, “* * * the evaporation of large quantities of pure water from the surfaces of the lakes created behind the dams built on the river” is one of the primary reasons for the sharp increase in salts and the precipitous decline in water quality. What the California official did not add is that the Colorado River Basin Project contemplates numerous additional dams throughout the Colorado River Basin and that the Central Arizona Project as now planned, together with now abuilding transmountain diversions, will further deplete that stream.

In concluding, the Federal officials declared: “* * * by 2,010, dissolved solids would rise to 1,223 parts per million at Imperial Dam and 990 parts per million at Hoover Dam further upriver. The respective figures in 1960 were 759 and 697” parts per million.

This grave indictment in regard to man-made pollution in the Colorado River can be made on behalf of the Fort Mojave, Chemehuevi, Colorado River Indian Tribes, Cocopahs and the Quechans of Fort Yuma—Trustee, United States of America has subsidized Federal reclamation projects so far in excess of the available supply of water that each of the Reservations is confronted with an ecological disaster from stream pollution. That disaster is accentuated not only by exist-

ing projects but those that are authorized and soon to be undertaken. Reference in that regard is made to the Central Arizona Project, final coup administered by the Federal agencies to the American Indians in the Colorado River valley on the Reservations to which the Supreme Court has decreed rights in the main stream of the Colorado River.

(h) *Central Arizona Project being constructed in disregard of water shortage, pollution—final coup to the American Indians in the Colorado River Basin*

As now contemplated the Central Arizona Federal Reclamation Project will pump water from the over-sold, over-appropriated, and polluted Colorado River approximately 1,200,000 acre-feet of water annually. Water for that project is not available—a well known and proved fact. Plans presently contemplate that the Colorado River water which will be taken, if the project is built, will be pumped from the Bill Williams River arm of Lake Havasu, immediately above Parker Dam, downstream from the Fort Mojave Indian Reservation and the Chemehuevi Indian Reservation, but above the Colorado River, Cocopah and the Yuma Indian Reservations.⁷⁰ Point of diversion from the Colorado River in its present polluted and diminished flow condition is of no consequence from the standpoint of the American Indians to be destroyed by it. Commit water from a stream to a non-Indian development and the pattern for seizure of Indian water in disregard of Indian prior and paramount rights is an accomplished fact—albeit illegal and wholly immoral.

⁷⁰Pacific Southwest Water Plan, Supplemental Information Report on Central Arizona Project, Arizona, pp. 27 et seq.

Recently this stark statement in regard to the planned environmental disaster on the Colorado River, was re-published:

"While there is disagreement with respect to time, the cold fact remains that eventually the water supply for the central Arizona project from mainstream Colorado River water will be reduced to less than 300,000 acre feet annually unless augmentation becomes a reality."⁸⁰

Succinctly stated, the quoted excerpt sets forth the shocking fact, a project costing in excess of a billion dollars is in the process of being constructed. It is designed for 1,200,000 acre-feet of water annually and as the quoted statement declares, "the cold fact remains * * *" that the Central Arizona Project has a deficit of 900,000 acre-feet of water annually below its planned and constructed capacity.

Exactly when that 900,000 acre-feet annual deficit will take place is not known. What is known is this fact:

"In the absence of imported water, the average divertible supply of water for the central Arizona unit is estimated to be 900,000 acre-feet by the year 2000."⁸¹

First victims of the catastrophe on the Colorado River will be the American Indians. Important in regard to the seizure of the Indian rights to the use of water de-

⁸⁰Western U. S. Water Plan, Plan For Study, Draft for Review February 5, 1971, page II-4.

⁸¹House Report 1849, 89th Congress. 2d Sess., "The Committee's Conclusions on Water Supply", page 34.

creed by the Supreme Court and those which have not been decrees, is the concerted well-planned attack upon the *Winters Doctrine* pursuant to which their prior and paramount rights have been guaranteed. That attack upon the Indian legal rights to water is the next phase of this consideration.

LEGAL PRINCIPLES RESPECTING AMERICAN INDIAN RIGHTS TO THE USE OF WATER IN GENERAL, AND THOSE INDIAN RIGHTS IN THE MAIN STREAM AND TRIBUTARIES OF THE COLORADO RIVER WITHIN THE STATE OF COLORADO

(a) *American Indian Winters Doctrine rights to the use of water [erroneously included by the Justice Department in its definition to the Supreme Court of "reserved rights of the United States"]*

- (1) *Interests in real property;*
- (2) *Immemorial rights;*
- (3) *Invested rights*

A statement of the pertinent facts as they relate to the waters of the main stream of the Colorado River and the tributaries of that stream within the State of Colorado, has been completed. Likewise reviewed has been the shortage of water in the Colorado River Basin; the grave pollution problem in that Basin; the tragedy of the Central Arizona Project.

In the paragraphs which follow there will be reviewed the legal predicates upon which American Indians have title to their rights to the use of water.

- (1) *American Indian rights to the use of water and interests in real property of the high and dry lands with all the attendant benefits flowing from the principle accruing to them*

It is elemental that rights to the use of water and interests in real property.⁸² Equally elemental is the principle that rights to the use of water are appurtenant and do not relate to the corpus of the land. Being part and parcel of the land itself, rights to the use of water in the absence of establishing a contrary intention, pass with the land is conveyed. Measure of the Indian rights to water with the conveyance, assuming a requisite express or implied is shown, is, of course, determined upon the facts of each transaction.⁸⁴

Adjudication of American Indian rights to water is accomplished through actions to quiet title. On the subject these statements have been made:

"The suit [to protect the Yakima rights] and other proceedings designed to procure the adjudication of water rights, was in its purpose to perfect one to quiet title to realty. *Ricketts v. Cattle Co. v. Miller & Lux*, 9 Cir., 1915, affirmed 218 U.S. 258."⁸⁵

⁸²Wiel, *Water Rights in the Western States*, 3d ed. sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 284, pp. 300-301; *United States v. Chandler-Dunbar Water Power Co.*, 256 U.S. 53, 73 (1913); *Ashwander v. TVA*, 297 U.S. 288, 300 (1936).

⁸³*Fuller v. Swan River Placer Mining Co.*, 12 Cal. 19 Pac. 836 (1898);

Wright v. Best, 19 Cal.2d 368; 121 P.2d 702 (1942); *Sowards v. Meagher*, 37 Utah 212; 108 Pac. 111 (1902). See also *Lindsey v. McClure*, 136 F.2d 65, 70 (9th Cir. 1943).

⁸⁴*United States v. Powers*, 305 U.S. 527, 533 (1933).

⁸⁵*United States v. Ahtanum Irrigation District*, 321, 339 (CA 9, 1956).

Continuing, the court stated:

"Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims of right to the use of the waters of the stream. *Reynolds v. Schmidt*, 10 Cir., 40 F.2d 238, 240."⁸⁶

Colorado's Supreme Court and other authorities on the subject reiterate the basic concepts of law respecting the nature of rights to the use of water and the remedies adopted in regard to the protection of those rights, in these terms:

"It is manifest from a careful examination of our statutes and from the repeated decisions of our courts that our proceedings, not technically one to quiet title, is quite analogous thereto * * *."⁸⁷

The same court described the proceedings as being *sui generis* in the nature of an action *in rem* with the right to the use of the water the subject matter of the decree.⁸⁸ Kinney has commented upon the subject in these terms:

"In Colorado, where the award of the water is made by the Courts to ditches which are given certain numbers according to their respective priorities * * * such an action may be regarded as strictly one in rem * * *."⁸⁹

⁸⁶*Ibid.*

⁸⁷*Crippen v. X Y Irr. Co.*, 32 Colo. 447, 76 Pac. 794 (1904).

⁸⁸*Louden v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535 (1897).

⁸⁹Kinney on Irrigation and Water Rights, page 2844, sec. 1569.

It is observed in passing that:

"In this state [Colorado] the right to the use of water for irrigation is deemed real estate, and is a distinct subject of grant, and may be transferred either with or without the land."⁹⁰ * * *

On that background consideration will be directed to other elements of the American Indian rights to the use of water and the concerted attack upon those Indian rights before the Supreme Court and elsewhere.

(2) *Immemorial Indian rights*

Long established tenets of Anglo-Saxon jurisprudence in regard to interests in real property and the conveyancing of them, have been applied by the Supreme Court respecting immemorial rights, title to which resided in many American Indian Tribes antecedent to the European invasion of the North American Continent. Reference in that connection is made to the case of *United States v. Winans*.⁹¹ In *Winans* there were Yakima Indian Nation rights of fishery in the Columbia River reserved by the Indians in their Treaty of 1855 with the United States which were the subject of attack.⁹² It is, of course, elemental that the right of fishery is an interest in real property.⁹³ Applying to that Treaty the basic precepts of the law of real prop-

⁹⁰David v. Randall, 44 Colo. 488; 99 Pac. 322 (1908).

⁹¹198 U. S. 371 (1904).

⁹²Id. at 377-378 (1904).

⁹³In support see "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," 91st Cong., 1st Sess., * * * A Compendium of Papers * * * Joint Economic Committee * * * pp. 460-471 et. seq.

erty, the Highest Court had this to say: "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians * * *

the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."⁹⁴

In declaring the Treaty between the Yakimas and this Nation immune from control or vitiation by a license to fish issued by the State of Washington, the Supreme Court had this to say:

"* * * the [Treaty] right was intended to be continuing against the United States and its grantees as well as against the State [of Washington] and its grantees."⁹⁵

Rejecting the contention that in some manner a Treaty could be violated by the issuance of a patent omitting reference to it, the Court ruled:

"* * * The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to other laws of the land."⁹⁶

Sound and explicit principles of Constitutional law based upon the supreme law of the land and equally fundamental principles of real property law, are the basis of the *Winans Decision*. Those concepts, as will be reviewed, are equally applicable to the prior, paramount and immemorial rights to the use of water of the American Indian Tribes who entered into Trea-

⁹⁴U.S. v. *Winans*, 198 U.S. 371, 381 (1904).

⁹⁵U. S. v. *Winans*, 198 U.S. 371, 381 (1904).

⁹⁶*Id.*, at 382.

ties or agreements with the Nation establishing their Reservations.

Reiteration of the legal concepts of the *Winans Decision* enunciated by the Supreme Court came about very soon by the Court in the *Winters Decision*,⁹⁷ respecting the Fort Belknap Indian rights to the use of water in the Milk River in Montana. There are striking factual and legal parallel between *Winans* and *Winters*. Both involved Indian Tribes in the status of grantors to the grantee United States, Trustee. Involved in both is the immunity of covenants between the Indians and the Nation from the admission of States into the Union, or State law. Crux of the *Winans* and *Winters Decisions* entailed interpretations of documents pursuant to which the Indians granted away vast areas—retaining nevertheless their immemorial title to interests in real property, immune from State law, to all that they did not grant.

Few cases have simpler facts, law and logic contained in them than does *Winters*. There are two salient issues: The meaning of an agreement between the Indians, grantor, and the Federal Government, grantee, as it relates to rights to the use of water; the effect of the admission of the State of Montana into the Union upon that agreement as it pertains to those rights. In the words of the Court regarding *Winters*: "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant."⁹⁸

⁹⁷*Winters v. United States*, 207 U.S. 564 (1908).

⁹⁸*Winters v. United States*, 207 U.S. 564, 575-576 (1908).

History of the relationship between the Indian Tribes and the National Government antecedent to the May 1888 agreement, as recited below, is important for it reflects the series of cessions of vast areas of land by the Indians, the last of which was the May 1888 agreement upon which, as the Supreme Court states, the *Winters Decision* "turns."⁹⁰

⁹⁰The facts of the *Winters Decision* in which the doctrine was enunciated, are of great importance for they go far in establishing the Federal—State—Indian relationship. Those facts are reviewed in some detail in the opinions of the Court of Appeals for the Ninth Circuit which were affirmed by the Supreme Court. (*Winters v. United States*, 143 Fed. 740, 741 (CA 9, 1906); *Winters v. United States*, 148 Fed. 684 (CA 9, 1906)) Involved were the rights to the use of water in the Milk River as they related to the Fort Belknap Indian Reservation in the State of Montana.

Respecting the background of those claimed rights to the use of water the Court of Appeals reviewed these salient facts:

"* * * By the provisions of article 4 of the treaty of October 17, 1855, proclaimed April 25, 1856, [Treaty with the Blackfeet, 1855, 11 Stat. 657] there was established and reserved to the Ft. Belknap Indians, and other Indian tribes, as and for their home and abiding place, nearly all that part of the state lying north of the Mussel Shell River, and extending from the crest of the main range of the Rocky Mountains eastward, approximately to what is now the western boundary line of the Ft. Peck Indian reservation. * * * By the terms and provisions of this treaty the Ft. Belknap Indians reserved to themselves the 'uninterrupted privileges of hunting, fishing, and gathering fruit, grazing animals, curing meat, and dressing robes.' Article 3 of Treaty, 11 Stat. 657. The territory which was so set apart and reserved to them at that time embraced the channel and the waters of Milk River from its source to its mouth lying within the confines of the United States. This continued to be the abode of these Indians until 1874, [18 Stat. 28, Ch. 96—An act to establish a reservation for certain Indians in the Territory of Montana.] at which time their territory was reduced so as to embrace nearly all that part of Montana lying to the north of the Missouri river, and extending from the Rocky Mountains eastward to the Dakota boundary line including Milk River. * * * The tract so set apart remained Indian country and the Indian reservation of these Indians until 1888, at which time the present Ft. Belknap Indian

(This footnote is continued on the next page)

As the resumé of history discloses, and in the words of the Court, "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use * * *" which was adequate for "a nomadic and uncivilized people." Continuing, the Court pointed out that the Nation and the Indians desired for the Indians "to change those habits and to become a pastoral and civilized people." The Indians under the agreement of May 1888, as the Court recognized, were to occupy a much reduced area which it described as follows: "The lands were arid and, without irrigation, were practically valueless." It was on that background of the May 1888 agreement between

reservation was carved out of the large reserve established in 1874 as their 'permanent home,' with the center of Milk river as the northern boundary line of the reservation, and which is now its northern boundary line." (25 Stat. 113, 114, Act of May 1, 1888, Ch. 213,—An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes.)

In upholding the rights of the Indians the Court of Appeals in its first opinion declared:

"In conclusion, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River' at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees." (Winters v. United States, 143 Fed. 740, 749 (CA 9, 1906)).

Of interest is the fact that the language used by the trial court and affirmed by the Court of Appeals for the Ninth Circuit, is very similar to that used by the Supreme Court in the *Winans Decision* although that authority is not cited.

In the opinion affirming the final injunctive decree against *Winters* the Court of Appeals further stated:

"* * * by the express terms of that treaty there was reserved to the Indians the waters of Milk River as a part and parcel of the reservation set apart to them." (148 Fed. 684, 686 (CA 9, 1906)).

the Indians and this Nation that the Court established the criteria pursuant to which that agreement would be interpreted. It is important to observe this crucial sentence from the decision:

"The Government is asserting the rights of the Indians."¹⁰⁰

Those rights to the use of water, as the Supreme Court states, were reserved by the Indians when they granted other properties to the National Government under the 1888 agreement. In regard to "the rights of the Indians" without which the lands they retained under the agreement are "practically valueless", the Court continued its analysis: "And yet, it is contended, the means of irrigation were deliberately *given up by the Indians and deliberately accepted by the Government*", reaffirming in that quoted statement the Indian-grantor, the Nation-grantee, situation respecting the agreement of 1888. (Emphasis supplied)

Proceeding to reject the "further contention" that the Indians, knowing tht the lands without water were "practically valueless" nevertheless granted away their rights, said: "The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." The Court then asked these crucial questions: "Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"¹⁰¹ Responding to its rhetorical questions, the Court stated: "If it were possible to believe affirmative answers, we might also believe

¹⁰⁰Winters v. United States, 207 U.S. 564, 576 (1908).

¹⁰¹Winters v. United States, 207 U.S. 564, 576 (1908).

that the Indians were awed by the power of the Government or deceived by its negotiators." In declaring that the Fort Belknap Indians retained—did not convey—their immemorial rights to the use of water in the Milk River, the Supreme Court emphasized:

"The Government is asserting the rights of the Indians",—not those of the United States.

Having thus declared that the Indian had retained their rights in the Milk River under their 1888 agreement—had not conveyed them to the United States—the Supreme Court presented the second phase of its opinion pertaining to the claims that the admission of Montana into the Union and the laws of that State in some manner denigrated the Indian title to the rights thus retained. From that opinion this excerpt is taken:

"Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676 'upon an equal footing with the original States.' "¹⁰²

In rejecting that contention the Supreme Court again alluded to the May 1888 agreement, denying that the admission of Montana "repealed" that agreement. It pointed out that Winters had to rely upon the same argument that the Indians did not retain rights to the use of water in the Milk River to sustain the second erroneous "contention."

Having declared that the Indians by the May 1888 agreement retained their rights to the use of water, the

¹⁰²Winters v. United States, 207 U.S. 564, 577 (1908).

Court said in regard to the relationship between Montana and the Nation—not the Nation and the Indians—that:

"The power of the Government [in its political relationship with Montana] to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. The *United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."¹⁰³

Reemphasizing the fact that the Indians retained their rights to the use of water, the Court reiterated its conclusion in these terms: "* * * it would be extreme to believe that within a year [after the agreement of May 1888] *Congress* destroyed the reservation and *took from the Indians the consideration of their grant*, * * *" of a vast land area to the United States, leaving the Indians without their rights to the use of water "a barren waste."

In another Supreme Court decision it applied the principles of the *Winans* and *Winters Decisions* in regard to the rights to the use of water retained by the Crow Indians pursuant to their Treaty of May 7, 1868, with the United States.¹⁰⁴ In applying the principles of the *Winters Decision* the Court, among other things, said this: "That the Treaty contains no definite provision concerning apportionment or use of waters." On that background the Court analyzed the issues there presented, specifically ruling "* * * that under the

¹⁰³*Ibid.*

¹⁰⁴*United States v. Powers, et al.*, 305 U.S. 527, 532 (1939).

Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters v. United States*, 207 U.S. 564) * * *.”¹⁰⁵ In the *Powers Decision* the Court recognized that the rights to the use of water part and parcel of the land and passed with the transfer by an Indian of his allotment. It declared nevertheless “* * * we do not consider the extent or prices nature of respondents’ rights in the waters.”¹⁰⁶

Indian immemorial rights, their immunity from State laws, control, adjudication, were the subject of a recent decision. There, as in *Winans*, the State of Washington sought to have, without success, its laws in regard to rights to the use of water in some manner override the Yakima Indian Nation Treaty of 1855 with the United States.¹⁰⁷ Relative to *Winters* the court said this: “That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in *Winters v. United States*, 207 U.S. 564.”¹⁰⁸

In declaring that the Yakimas retained—did not convey—those immemorial rights to the use of water, title to which was vested in them except as to those specifically granted—the court made the following ruling predicated upon an unbroken line of authority: “As in the *Winters* case, we must answer in the negative the questions there posed: “Did they [the Indians] give up

¹⁰⁵*Ibid.*

¹⁰⁶*Id.*, at 533.

¹⁰⁷*United States v. Ahtanum Irrigation District*, 236 F.2d 321 (CA 9, 1956); Appellees’ cert. denied 352 U.S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d 307; Cert. denied 381 U.S. 924 (1965). For decree in case see 330 F.2d 915.

¹⁰⁸*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 325 (CA 9, 1956).

all this? 'Did they [the Indians] reduce, the area of their occupation and give up the waters which made it valuable or adequate?' "¹⁰⁹

Continuing in regard to *Winters*, the court stated: "As was said in the *Winters* case, (207 U.S. 564, 576): 'The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people.' "¹¹⁰ Applying the concepts of the *Winans Decision* the court concluded: "When the [Yakima] Indians agreed to change their nomadic habits and to become a pastoral and civilized people, using the smaller reservation area, it must be borne in mind, as the Supreme Court said of this very [Yakima] treaty, that 'the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.' *United States v. Winans*, 198 U.S. 371, 381." "¹¹¹

Rights retained under the Treaty relative to the source of water involved, the court said this respecting the Indian immemorial rights: "Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area." "¹¹²

Retention of those immemorial rights was adjudicated in these terms "The Indians did not surrender any part of their right to the use of Ahtanum Creek regardless of whether; the Creek became the boundary or whether it flowed entirely within the reservation." "¹¹³

¹⁰⁹Id. at 326.

¹¹⁰Ibid.

¹¹¹*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326 (CA 9, 1956).

¹¹²Id. at 326.

¹¹³Id. at 326.

Rejecting the contentions pressed by the State of Washington relative to its jurisdiction over the rights of the use of water retained by the Yakimas under their Treaty, the court dismissed them in these terms:

"It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444."¹¹⁴

Underscoring the immunity of the Yakima rights from the control or acquisition pursuant to the laws of the State of Washington, this succinct statement was made respecting the Indian prior and paramount rights:

"No portion of that volume of water or the right to the use thereof, was open to appropriation or other acquisition under state law by the defendants or their predecessors in interest. *United States v. McIntyre*, 9 Cir., 101 F.2d 650, 653-4; *Cf. Federal Power Comm'n v. Oregon*, 349 U.S. 435."¹¹⁵

In keeping with the basic precepts of law, the Indian *Winters Doctrine* rights to the use of water retained by them—not granted to the United States—are sufficient to meet the present and future reasonable water requirements for their Reservations.¹¹⁶ On repeated occasions the principle has been sustained of immemorial ownership by the American Indians of their rights to

¹¹⁴*Id.* at 328.

¹¹⁵*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326 (CA 9, 1956).

¹¹⁶*Conrad Investment Co. v. United States*, 161 Fed. 829 (CA 9, 1908).

the use of water retained by them when they ceded away to the National Government vast areas of their land.¹¹⁷

(i) *Principles of Western and Indian law respecting interpretations of conveyances applied by Supreme Court in Winters*

In *Winters* the Supreme Court in these succinct terms stated the key issue before it:

"The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant."

It then declared that the Indians intended to retain rights to the use of water for their Reservation for it would be uninhabitable without water.¹¹⁸

In thus construing the document upon which the Supreme Court specifically adjudged its opinion turns, it applied a long-standing precept of law in Western United States respecting rights to the use of water.¹¹⁹ It declared in keeping with that Western law, that the Indians intended to retain rights to the use of water and the United States did not intend to have those rights granted to it.¹²⁰

¹¹⁷*Skeem v. United States*, 273 Fed. 92 (CA 9, 1921); *United States v. McIntire*, 101 F.2d 650 (CA 9, 1939). (In addition to Supreme Court decisions and others previously cited.

¹¹⁸*Winters v. United States*, 207 U.S. 564, 575-576 (1908).

¹¹⁹1 *Wiel*, *Water Rights in the Western States*, 3d ed., Sec. 550, pp. 586, 587.

¹²⁰See Colorado decisions adhering to the same principle of the intent to convey or not to convey rights, a matter of intention; *Denver Joint Stock Land Bank v. Markham*, 106 Colo. 509, 107 P.2d 313 (1940).

Another basic precept of the law respecting documents of grant from the Indians to the National Government was applied by the Supreme Court in *Winters* using these terms:

“By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.”¹²¹

Predicated upon those fundamental concepts of the law the Indians retained—did not grant their rights to the use of water to the National Government. *Winters*, *Powers*, *Conrad Investment Co.*, *Ahtanum*—all of the cases reviewed above pertained to immemorial rights to the use of water retained by treaties—not granted away—by the Indians in those decisions.

In the paragraphs which follow the Indian rights were conveyed to them by the United States as part and parcel of the lands which constitute their Reservations.

(3) *American Indian invested rights to the use of water*

Cruel and mindless acts of agents of the United States who determined the life or death of the American Indians must be kept in the foreground in this phase of the consideration. The American Indians on the main stream of the Colorado River are prime examples of that cruel mindlessness. They were unjustly deprived of their immemorial rights to the use of water in

¹²¹*Winters v. United States*, 207 U.S. 564, 576 (1908).

the Colorado River, dating back to antiquity, upon which they relied.¹²² Their rights were extinguished by Congressional enactments concerning which they had no knowledge. Those laws required claimants of title to prove their rights or lose them. Thus the Trustee succeeded to the Indian rights under its own laws—the laws that required the Trustee to protect and preserve those Indian rights.¹²³

There is now pending before the Supreme Court in the alleged issues before it, whether the rights to the use of water subsequently invested in the Indians will be stripped from them by perhaps the last cruel and mindless act of agents of the Trustee.

In the *Walker River Decision* the Court of Appeals for the Ninth Circuit declared that a reservation created by an 1859 Executive Order was entitled to divert and use water to meet the Indian needs.¹²⁴ It was recognized in that opinion that the *Winters Decision* was based upon a Treaty pursuant to which the Indians retained for themselves their rights to the use of water. Quite aside from that very material difference in the source of title, it said this: "The power of the Government to reserve the waters to the Indians and thus exempt them from subsequent appropriation by others is beyond debate."¹²⁵

¹²²"Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," 91st Cong., 1st Sess., * * * A Compendium of Papers * * * Joint Economic Committee * * * pp. 478 et seq.

¹²³Fort Mojave Claim, 7 Indian Claims Commission, Docket 295, Findings of Fact.

¹²⁴United States v. Walker River Irrigation District, 104 F.2d 334, 336 (CA 9, 1939).

¹²⁵United States v. Walker River Irrigation District, 104 F.2d 334, 336 (CA 9, 1939).

Repeated reference has been made to the rights to the use of main stream water decreed by the Supreme Court to the Fort Mojave, Chemehuevi, Colorado River Indian Tribes, Cocopah and Fort Yuma Reservations. As stated, those Reservations are set forth on Plate I and the decreed rights tabulated on the facing page of that Plate. Those rights thus decreed to the Indians and their Reservations are invested rights—first taken from the Indians by the National Government and then restored to them. As in the *Walker River Decision* the Supreme Court recognized the power of the National Government to reserve land and rights to the use of water for the Indian Reservations. Having referred to “* * * the broad power of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV § 3 of the Constitution”, the Court said this:

“We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.”¹²⁶

Rejecting the contentions of the State of Arizona which sought throughout to limit the Indian rights, the Highest Court continued:

“Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. * * * In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. * * * We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.”¹²⁷

¹²⁶Arizona v. California, 373 U.S. 546, 598 (1963).

¹²⁷Arizona v. California, 373 U.S. 546, 598 (1963).

That the United States did reserve rights to the use of water in the main stream of the Colorado River for the Indian Reservations has been adjudged and decreed by the Supreme Court; that the Supreme Court decreed those rights to the Indians is free from doubt.¹²⁸

- (4) *American Indian immemorial and invested rights to the use of water in the main stream of the Colorado River and its tributaries throughout the Basin of that stream extend to the reach of the Colorado River within the State of Colorado and into the tributaries of that stream within that State*

Basic and fundamental tenets of Western law respecting rights to the use of water are here involved. No principle of that field of jurisprudence is more firmly established than that a right to use water must of necessity extend to and be enforceable to the very well-springs of the source in which the right exists. Colorado's Supreme Court at an early date in the relatively short history of Western water law reviewed the nature of the interest in its tributaries of a downstream owner of rights in the main stream and ruled: To say "* * *" that an appropriator from the main stream is subject to subsequent appropriators from its tributaries would be the overthrow of the entire doctrine" of prior appropriation.¹²⁹ Colorado's court in the same decision declared the obvious:

"All large streams are dependent upon tributaries for a supply of water. To cut off the water from such tributaries would be to destroy the capacity of the stream, to the injury of those below."

¹²⁸See above page 22, footnote 53.

¹²⁹Strickler v. Colorado Springs, 16 Colo. 61; 26 Pac. 313, 315 (1891).

On the subject of the downstream owner of rights to the use of water relying upon all upstream sources, the Supreme Court of Utah reiterated the principles adhered to by Colorado's court.¹³⁰

Nature of the right to protect the source of water is well stated in these terms by the Colorado Supreme Court: "It is a well-established principle in this jurisdiction that all waters are part of a natural water course, whether visible or not, constituting a part of the whole body of moving water."¹³¹

¹³⁰*Richlands Irrigation Co. v. Westview Irrigation Co.*, 96 Utah 403; 80 P.2d 458, 465 (1938):

"The entire watershed to its uttermost confines, covering thousands of square miles, out to the crest of the divides which separate it from adjacent watersheds, is the generating source from which the water of a river comes or accumulates in its channel. Rains and snows falling on this entire vast area sink into the soil and find their way by surface or underground flow or percolation through the sloping strata down to the central channel. This entire sheet of water, or water table, constitutes the river and it never ceases to be such in its centripetal motion towards the channel. Any appropriator of water from the central channel is entitled to rely and depend upon all the sources which feed the main stream above his diversion point, clear back to the farthest limits of the watershed."

Oregon's Supreme Court summarized the general proposition in this manner: "The rights of prior appropriators from a stream cannot be impaired by subsequent appropriations of water from its tributaries." (*Dry Gulch Ditch Co. v. Hutton*, 170 Ore. 656; 133 P.2d 601, 611 (1943).)

¹³¹*City of Colorado Springs v. Bender*, 148 Colo. 458; 366 P.2d 552, 555 (1961).

New Mexico's highest court, drawing on several authoritative sources, upheld the fundamental rights of a downstream user to exercise that right in all waters contributing to his source of supply, stating: "An appropriation when made follows the water to its original source, whether through surface or subterranean streams or through percolations." (*Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59; 332 P.2d 465, 470 (1958)). Quoting the Colorado law on the subject, the New Mexico court set forth this basic proposition: "* * * The law in Colorado governing the first classification above suggested, i.e., underground waters which, if not intercepted, will ultimately find their way to a natural stream, is well settled. It has been fre-

The Supreme Court of Colorado, citing its earlier decisions, has summarized as follows: “* * * we have held that seepage and percolation belong to the river * * *.”¹³²

In specifically declaring and adjudicating the Indian rights in tributaries far removed from their lands, the Court of Appeals for the Ninth Circuit said this:

“The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. * * * it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the county originate in the mountains [especially true of the Colorado River] and far from the lands to which their waters ultimately became appurtenant.”¹³³

Wiel has summarized the basic rights of downstream owners in the tributary water sources in these terms:

“* * * it is proper to look upon the stream [here the Colorado] as not merely consisting of the channel and flow at the point where the observer is standing, but as a composite body in which the upper branches and tributaries are an integral part.”¹³⁴

quently held by our appellate courts, from a very early date down to the present time, that all underground waters which by flowage, seepage or percolation will eventually, if not intercepted, reach and become a part of some natural stream either on or beneath the surface, are governed and controlled by the terms of the constitution and statutes relative to appropriation, the same as the surface waters of such stream.” (Ibid.)

¹³²Safranek v. Town of Limon, 123 Colo. 1330; 228 P.2d 975, 977 (1951).

¹³³United States v. Ahtanum Irrigation District, 236 F.2d 321, 325 (CA 9, 1956).

¹³⁴1 Wiel, Water Rights In The Western States, 3d ed., Sec. 337, p. 358.

Error pervades every phase and facet of the *Eagle River Adjudication* and *Water Division No. 5 Adjudication* by reason of the failure of the Justice Department to bring to the attention of the Highest Court the Indian rights in the streams in question. In the present status of the law and the facts which exist, that Court has no jurisdiction and, as stated above, the cases should be dismissed forthwith.¹⁸⁵

Reference is warranted to the law of the Colorado River which exempts Indian rights from its operation. It is provided in the Colorado River Compact that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."¹⁸⁶ In the Upper Basin Compact it is provided that:

"Nothing in this Compact shall be construed as:

"(a) Affecting the obligations of the United States of America to Indian tribes;

* * * * *

"(c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System, * * *."¹⁸⁷

Reference is also made to the scope of the decision in *Arizona v. California*.¹⁸⁸ That is a unique decision, markedly limited to documents and statutes which were before the Court. * * * we have decided" said the Highest Court, "that Congress has provided its own

¹⁸⁵See above, pages 2 et seq.

¹⁸⁶Hoover Dam Documents, Wilbur & Ely, 1948, p. 28, Art. VII.

¹⁸⁷Hoover Dam Documents, Wilbur & Ely, 1948, p. A181, Art. XIX.

¹⁸⁸373 U. S. 546 (1963).

method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact."¹³⁹ The Court rejected the contention it could substitute its will for that of Congress and undertake its own "equitable apportionment." Adding an additional rejection, it states: "Nor does the Colorado River Compact control this case." Rather the Supreme Court emphasized that Congress exercised its Constitutional powers, to the exclusion of all else, in regard to the mainstream water in the Lower Basin.¹⁴⁰

Succinctly it was adjudged that the prime issues in *Arizona v. California* related strictly to "The Congressional scheme of apportionment" relating to an annual 7,500,000 acre-feet in the main Colorado River. It stated in regard to the Lower Basin and then only under the Congressional Act in question, that "* * * the tributaries are not included in the waters [7,500,000 acre-feet annually] to be divided but remain for the exclusive use of each State."¹⁴¹

In error—and going far beyond the limited scope of *Arizona v. California*—the Respondents say this, purporting to support their position that Congress subjected all of the rights of the United States to State police regulations:

"* * * The Master found it inappropriate to adjudge matters of interstate rights and priorities on the tributaries (Master's Report 332-334) and this Court noted that under § 18 of the Project Act 'regulation of the use of tributary water' was left to the states (Id. 588)."¹⁴²

¹³⁹Id. at 565.

¹⁴⁰Id. at 566.

¹⁴¹Id. at 567.

¹⁴²See Respondents' Brief, APPENDIX, p. 24; APPENDIX, p. 27, footnote 53.

That quoted excerpt was limited to the issues before the Supreme Court in regard to Arizona, California and Nevada. The State of Colorado was not a party to *Arizona v. California*. None of the issues involving the Boulder Canyon Project Act as amended and supplemented, has relationship with the alleged issues presented to the Supreme Court in the two adjudications, the subject of this consideration. Hence, as stated, Respondents commit grave error when they endeavor to make applicable against the Indian rights in the Colorado River and its tributaries within the State of Colorado the purported authorities upon which they rely in their attacks upon the Indian *Winters Doctrine* rights to the use of water.

- (5) *Good water quality is a property characteristic of American Indian rights to the use of water in the Colorado River—it has been violated*

There has been reviewed above the "*Pollution of the Colorado River—an immediate irreparable loss to the American Indians.*" It is a basic precept of the law that the owner of rights to the use of water is protected against the deterioration in water quality. Indeed, as the authorities set forth below disclose, the right to preserve the quality of water is commensurate with the right to a quantity of water. Manifestly that property characteristic of the rights to the use of water of the American Indians in the Colorado River has been violated.¹⁴³

¹⁴³APPENDIX, Page 30; *Markwardt v. Guthrie*, 18 Okla. 32; 90 Pac. 26 (1907); *Phoenix Water Co. v. Fletcher*, 23 Calif. 481, 487 (1863); *Wright v. Best*, 19 Calif. 2d 368; 121 P.2d 702 (1942); *Adams v. Portage Irr. & Res. & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937); 95 Utah 20, 81 P.2d 368 (1938).

- (6) *Interior Department's general statement respecting American Indian rights and interests in the Colorado River Basin; its trust obligation to protect those rights*

A proper perspective of Indian rights to the use of water and the Nation's obligation in regard to those rights is well stated in the following excerpt from an official report by the Interior Department, "The Colorado River, * * * A Comprehensive Departmental Report * * * March 1946":

"Within the Colorado River Basin, * * * are 29 Indian reservations, 1 nonreservation Indian school and 2 sanatoria. The Indian land totals 26,823,062 acres, of which 1,271,117 acres are in trust allotments, 24,557,040 acres in tribal ownership and 994,905 acres in Government ownership. The combined Indian population of the area totals more than 80,000 the majority of whom are full-bloods. The largest single group is the Navajos in Arizona and New Mexico, who total more than 50,000, practically all of whom are full-bloods.

"These Indians and their resources in land and water rights are the special concern of the Federal Government. * * * These rights and obligations were recognized by the Colorado River Compact Commission as evidenced by article VII of the compact which reads as follows: 'Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian Tribes.' One of the Government's objectives in the development of the basin must be not only the protection of the Indian's purely legal rights but the discharge of its moral obligations as well." (P. 261)

In the paragraphs which immediately follow additional authorities and comment lend clarity to the nature of the rights of the American Indians so gravely imperiled by the Justice Department's course of conduct in the *Water Division No. 5 Adjudication* and in the *Eagle River Adjudication*.

AMERICAN INDIAN RIGHTS TO THE USE
OF WATER IN THE COLORADO RIVER AND
ITS TRIBUTARIES ARE PRIVATE INTER-
ESTS IN REAL PROPERTY HELD IN TRUST
BY THE UNITED STATES FOR THE INDIANS

In the President's Message of July 8, 1970, sharply condemning the Interior and Justice Departments for inherent conflicts of interest, the President said this: "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people * * *." They are, indeed, the difference between life and death. Continuing, the President stated: "* * * frequently they are also the object of extensive legal dispute. In many of these legal confrontations,

the Federal Government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *National* interest in the use of land and water rights *and* the *private* interests of Indians in land which the Government holds as trustee."¹⁴⁴

Legal aspect of the trust obligations of the United States in regard to American Indian rights to the use

¹⁴⁴Congressional Record, Senate, July 9, 1970, pp. S 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

of water have been reviewed in detail.¹⁴⁵ Justice Department's publication provides a source, declaring the private nature of American Indian interests in real property, which include Indian rights to the use of water. By reason of their private character, just compensation to the Indians must be paid when the National Government in the exercise of its power of *eminent domain* takes those rights.¹⁴⁶

Nature of the private Indian property interests held in trust for them by the Nation, including their rights to the use of water, are sharply differentiated under the law from "public property", and by law are required separately to be administered.¹⁴⁷

¹⁴⁵Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Cong., 1st Sess., * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, pp. 469 et seq.

¹⁴⁶Federal Eminent Domain, Department of Justice Sec. 15. What constitutes "private property" under the Fifth Amendment. Page 56.

* * *

N. *Property of Indian wards*.—As guardian of the Indian wards, the United States has the power of management and control over lands occupied by the tribes or Indian allottees. Such lands prior to some division or allotment in severalty, are held by the tribe in common. While strict legal title is often in the United States, under the treaties, statutes, or executive orders creating their reservations, the Indian tribes usually have a full beneficial interest, described as a "right of perpetual use and occupancy." Since this right is not to be narrowly construed, the tribal interest has been treated for all practical purposes as equivalent to ownership of the land itself. Thus when there is taking of the whole tribal interest within the meaning of the Fifth Amendment, the Government must include as part of just compensation to the tribe the value of the natural resources on the land such as timber or minerals. Certain profits *à prendre*, such as the right to take fish or gather herbs, occasionally granted to Indian tribes, are also regarded as property rights. Pages 76 & 77.

See page 66—E. Interests in real property * * *.

See *United States v. Gerlach Live Stock Company*, 339 U.S. 725 (1950).

¹⁴⁷Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Cong., 1st Sess., * * *

(This footnote is continued on the next page)

PRESIDENTIAL CONDEMNATION OF "INHERENT CONFLICT OF INTEREST" RESPECTING AMERICAN INDIAN RIGHTS WHICH PERVADES JUSTICE DEPARTMENT—"NO SELF-RESPECTING LAW FIRM WOULD EVER ALLOW ITSELF TO REPRESENT TWO OPPOSING CLIENTS IN ONE DISPUTE * * *"¹⁴⁸

(a) *Condemnation of Justice Department "inherent conflict of interest"*

Presidential condemnation of "inherent conflict of interest" within the Justice Department in regard to American Indian rights to the use of water must become the hallmark of a new day for the Indians. It is set forth in the heading of the present phase of the consideration. That conflict of interest within the Justice Department is exemplified by the *Water Division No. 5* and *Eagle River Adjudications*. All-pervasive nature of that conflict of interest and the devastation now being wrought upon the American Indians throughout Western United States extending far beyond the confines of the Colorado River, requires review.

(b) *Legislation introduced to correct Justice Department conflict of interest*

Acting in accordance with the President's Message condemning the Justice Department's inherent conflict of interest, corrective legislation was introduced in the last session of Congress. Bills were presented "To pro-

A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, pp. 490 et seq.

25 U.S.C. 1 et seq.; 5 U.S.C. 485;

Handbook of Federal Indian Law, Cohen, pp. 33 et seq.; 94 et seq.

¹⁴⁸Congressional Record, Senate, July 9, 1970, pp. S 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

vide for the creation of the Indian Trust Counsel Authority, and for other purposes.”¹⁴⁹ In substance the Congress would establish an Authority with power to represent American Indians in their struggle to preserve and protect their natural resources. That Authority would be independent of the Justice Department and Interior Department lawyers whose inherent conflict of interest the President condemned.

(1) *Senate hearings in regard to inherent conflict of interest*

Comprehensive hearings have been held by the Senate Subcommittee on Indian Affairs in regard to the legislation mentioned above.¹⁵⁰

(2) *Secretarial statement as to need to correct Interior and Justice conflict of interest*

Senators and Interior Department officials testified at length and in detail in regard to the grave damage to the Indians by reason of the conflict of interest in both the Interior and Justice Departments respecting Indian natural resources. American Indian representatives suffering at first hand from the conflicts, emphasized the great need for the legislation.

Assistant Secretary Harrison Loesch outlined in detail the dilemma created by the conflict. How the conflict permeates all aspects of American Indian rights was underscored by Assistant Secretary Loesch in this colloquy:

“Senator McGovern. And you are convinced the members of that [Pyramid Lake] task force

¹⁴⁹ H. R. 18727, S. 4165, 91st Congress, 2d Session.

¹⁵⁰ Hearings Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, “The President’s Recommendations On Indian Policy.” September 21, 25, 1970.

are free of the conflict-of-interest charge that might be raised, where a complicated matter of this kind is to be resolved.

* * *

"Mr. Loesch. I question, Mr. Chairman, whether in any such situation you can get rid of, in a committee or a task force, an inherent conflict of interest, because members of the task force are Federal employees who, in their daily jobs belong to some bureau or other.

* * *

"Mr. Loesch. The conflict of interest is certainly not confined, Mr. Chairman, to the Department of the Interior, and I think that we have tried very hard in the Department of Interior to resolve those conflicts.

"The conflicts spread all across the Government, and it is for this reason that an independent legal agency to attend to those conflicts is needed."¹⁵¹

It is impossible to perceive a more authoritative source than Assistant Secretary Loesch. He is daily confronted with the inherent conflict of interest in the Interior Department. His obligations entail that of acting as the agent for the Indian Trustee, the United States, and for agencies of the Federal Government now and historically in conflict with those Indian interests.

¹⁵¹Hearings Before the Subcommittee on Indian Affairs * * * United States Senate, * * * September 21, 25, 1970, P. 36, lines 4-14; P. 37, lines 6-12.

(3) *Justice Department conflict of interest most recently analyzed by report to Senate Judiciary Committee*

A most recent study published by the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, fully documents the Justice Department conflict of interest.¹⁵² Great significance must be ascribed to that publication by the Senate Judiciary Committee. It brings to focus the incredible duality of obligations in which the Justice Department is placed by its "inherent conflict of interest."

(4) *Conflict of interest in regard to American Indian property interests admitted by Justice Department*

It is admitted by the Justice Department officials—it could not be denied—that it purports to represent opposing Indian and non-Indian interests in the same litigation. This statement was made in the Justice Department's opposition to the legislation which has been discussed above:

"At the present time there is an Indian Division in the Office of the Solicitor, Department of the Interior, which serves as advisor to the Secretary of the Interior and the Bureau of Indian Affairs on legal matters. Litigation for [a] the purpose of enforcing or protecting rights possessed by Indians because of their being under the protective arm of the United States, and [b] the defense of claims brought against the United States and

¹⁵²91st Cong., 2d Sess., Committee Print, "A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, Subcommittee on Administrative Practice and Procedure * * *" Committee on the Judiciary.

its officers by Indians and Indian tribes, are handled by the Land and Natural Resources Division of the Department of Justice."¹⁵³

Full impact of that conflict of interest upon the American Indians cannot be measured. That the Indians have been, are now and in the future will be, unless immediate corrective action is taken, grievously injured by it is an indisputable fact.

DENIGRATION BEFORE THE SUPREME COURT OF THE AMERICAN INDIAN RIGHTS TO THE USE OF WATER—DISASTROUS TO THE INDIANS

- (a) GREATLY AID JUSTICE DEPARTMENT IN INDIAN "TAKING" CASES NOW PENDING BEFORE THE INDIAN CLAIMS COMMISSION, COURT OF CLAIMS AND ELSEWHERE; AND IN FUTURE LITIGATION
- (b) GREATLY AID JUSTICE DEPARTMENT IN REPRESENTING INTERIOR'S RECLAMATION BUREAU AND OTHER FEDERAL AGENCIES WHICH ARE NOW AND HAVE BEEN INVADING INDIAN RIGHTS TO THE USE OF WATER THROUGHOUT WESTERN UNITED STATES

Reference has been made to the divided obligations of the Justice Department. It is the aggressive "adversary" against the Indians in the proceedings before the

¹⁵³Undated letter from the Assistant Attorney General, Land and Natural Resources Division, to Mr. Kenneth R. Cole, Jr. Deputy Assistant to the President for Domestic Affairs, The White House Washington, D. C.

Indian Claims Commission and the Court of Claims, a matter of extended public record in both tribunals. In those courts and in many cases in Federal district courts the Justice Department vigorously attacks Indians' titles, claims, and equities.¹⁵⁴ Indeed, personnel of the Indian Claims Section of the Land and Natural Resources Division, Department of Justice, may be the most important, best staffed and competent in that Division. Its legal position is of necessity frequently diametrically opposed to the position of the General Litigation Section which has the obligation of representing the Indians' interest so vigorously opposed by the Indian Claims Section. Both Sections are administered by the same Assistant Attorney General—who, as stated above, admits the conflict of interest. All appellate cases in the ultimate, for and against the Indians, are the responsibility of the Solicitor General and his staff; hence, the grave contradictions in the *Eagle River* and *Water Division No. 5 Adjudications*.

A key defense relied upon by the Justice Department against Indians who are deprived of their homes and abiding places, has been stated as follows:

"* * * The Indian title [under certain circumstances] as against the United States is merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they see fit until such right of occupation has been surrendered to the government."¹⁵⁵

From the same source it is stated that when the National Government forces the Indians to abandon the

¹⁵⁴See 25 U.S.C. 70 n; 25 U.S.C. 345;

For a general statement of the responsibility respecting the Indian Claims Commission, see 41 Am. Jur. 2d, Indians, Sec. 21 and 22, pages 844-845.

¹⁵⁵41 Am. Jur. 2d, Indians, Sec. 23, p. 845.

land which they occupy, they are not entitled to just compensation under the Fifth Amendment of the Constitution. Executive order Indian Reservations, says the same source, do not invest Indians with compensable interests in the absence of Congressional recognition, express or implied, of the Indian title to their lands.¹⁵⁶ Hence the course of the Justice Department before the Supreme Court and in the courts below, is not beyond understanding, though not justified.

(a) *Denial by Justice Department of Indian interest in Colorado River and its tributaries related to present and potential claims*

Justice Department's anti-Indian position respecting the interests and the reasons for it, have recently been succinctly stated in these terms:

"* * * the defense of Indian Claims Commission proceedings forces upon that Department the role and also the mentality of being an adversary to many Indian claims to natural resources."¹⁵⁷

That role of adversary against the Indians is epitomized by its position before the Supreme Court in the *Eagle River and Water Division No. 5 Adjudications*. Its cryptic footnote to the Court—"To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division No. 5 * * * for public land which had been withdrawn for public us, "relate to Indian lands."¹⁵⁸ Meaningless on its

¹⁵⁶41 Am. Jur. 2d, Indians, Sec. 25, page 847.

¹⁵⁷91st Cong., 2d Sess., "A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources", Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary,—"Discharge of the Federal Trust Responsibility to Enforce Claims of Indian Tribes": Case Studies of Bureaucratic Conflict of Interest—Reid Peyton Chambers.

¹⁵⁸APPENDIX, Page 79, footnote 3.

face, that quoted excerpt partakes of meaning when consideration is given to the Executive Order Reservation water rights decreed to them by the Supreme Court.¹⁵⁹ Everything points to the seizure of the main stream decreed rights of the Indians to which reference has been made, for use by the Central Arizona Project. Hence, Justice is confronted with this dilemma as is the Interior Department: Recognize before the Supreme Court that the Indians have rights to the use of water in the main stream and its tributaries and it will in effect be a declaration against interest on the part of those seizing Indian rights, if the Indians seek either the restrain that seizure or remuneration for the loss of those rights.¹⁶⁰

Justice Department's failure to assert in the *Water Division No. 5* and in the *Eagle River Adjudications* the main stream Supreme Court decreed rights of the Fort Mojave, Chemehuevi, Colorado River, Cocopah and Fort Yuma Indian Reservations, can only be viewed as an attempted denial of those rights within the State of Colorado in those Adjudications. Hence, as stated earlier, the cryptic statement from the above quoted footnote to the Court, is a clear violation of the Nation's Trust obligation to the Indians and a breach of responsibility owing to the Supreme Court.¹⁶¹ Gravest aspect of the Justice Department's

¹⁵⁹See Plate 1 and facing page; page 22, footnote 53; See review of Indian and invested rights to the use of water in rivers and their tributaries, page 54 *supra*.

¹⁶⁰Note: A careful investigation during a four (4) year period of the title of Indians with decree rights evidences recognition and confirmation of the Indian title protecting those titles under the Constitution. Hence, the unfortunate—unfitting—course adopted by the Justice Department will not aid its "adversary" role against the Indians.

¹⁶¹See above, a review of rights of the Indians in the main stream and tributaries of the main stream of the Colorado River within Colorado, page 54.

course of conduct is the denial of the main stream Indian Reservations of having their day in court respecting their rights in the main stream of the Colorado River and its tributaries. It is not for the Justice Department to adjudge, declare and determine whether those Indians have rights within the State of Colorado. Only by a final determination of the subject of those rights within the State of Colorado by a court of competent jurisdiction, can those rights be adjudged or denied. It is on that concept of the Nation's obligations to the Indians, in the words of the President in his July 8, 1970 Message, that the United States as Trustee is obligated to advocate the Indian position "* * * without reservation and with the highest degree of diligence and skill."¹⁶²

(b) *Erroneous statements by Justice Department to the Supreme Court respecting American Indian rights to the use of water—refusal of Justice Department to correct erroneous statements*

Indians' *Winters Doctrine* rights to the use of water have been reviewed in detail.¹⁶³ Indian retention of their immemorial rights to the use of water when their interests were conveyed to the United States by treaty or agreement, has been extensively discussed. Indian ownership of the rights of fishery in various streams was adjudged in *Winans*.¹⁶⁴ Ownership of immemorial rights to the use of water retained by the Indians is the Supreme Court ruling in *Winters*. Particular reference has been made to the Supreme Court's statement

¹⁶²Congressional Record, Senate, July 9, 1970, pp. S. 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

¹⁶³See above, pages 37 et seq.

¹⁶⁴See above, pages 40 et seq.

controlling in that case in regard to the May 1888 agreement pursuant to which the Indians retained—did not grant—their immemorial rights to the use of water.¹⁶⁵ There is a coalescence of the tenets of both *Winans* and *Winters* regarding the retention by the Indians of their immemorial rights to the use of water in *Ahtanum*.¹⁶⁶

Let this fact be emphasized: In each of those cases the title to the rights to the use of water involved was retained by—not granted to—the Indians either expressly or impliedly by the United States. Most assuredly in those cases the rights to the use of water were not reserved for the use of the United States. Yet, in grave error the Justice Department says to the Supreme Court this:

“Reserved rights entitle the United States to use as much water from sources on land withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn
* * * *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601.”¹⁶⁷

Winters, as reviewed above, is a reservation of rights to the use of water by the Indians for *themselves*, not for the “United States to use * * *.” Indeed, the Supreme Court in *Winters* specifically adjudged “The Government is asserting the rights of the Indians.”¹⁶⁸

¹⁶⁵See page 41 et seq. *Winters*: “The [*Winters*] case, as we [the Supreme Court] view it, turns on the agreement of May, 1888, * * *” between the Indians and the United States pursuant to which the Indians retained their immemorial rights to the use of water.

¹⁶⁶See above, page 49 et seq.

¹⁶⁷APPENDIX, Page 20.

¹⁶⁸See above, page 44. Note: *Arizona v. California* likewise cited will be separately considered. It underscores the Justice Department misstatement to the Court.

Errors by the Justice Department to the Supreme Court are reiterated and repeated throughout its *Eagle River Adjudication* brief:

“* * * United States unquestionably has the right to use as much water * * * on lands withdrawn from the public domain * * *”¹⁶⁹

Winters is again cited to support that erroneous statement, as is *Arizona v. California*. Neither decision supports the erroneous concept.

Continuing in error to the Supreme Court, the Justice Department brief in the *Eagle River Adjudication*, says this: “In *Winters* where the United States asserted this right with respect to an Indian reservation * * *”—a quotation stripped from context is set forth.¹⁷⁰ Nature of that quoted error is obvious—“the right” purportedly asserted by the United States was not for its “use” but rather in the explicit words of the Court in *Winters*—the “Government” was asserting the right of the Indians retained by them in their May 1888 agreement with the United States.¹⁷¹

Erroneous statements that the Indian rights were “reserved” by the United States for use of the United States pervade every part of the Petition for Certiorari in the *Eagle River Adjudication* and in its brief in

¹⁶⁹APPENDIX, Page 21.

¹⁷⁰APPENDIX, Page 21. Note: The statement in *Winters* stripped from context by the Justice Department simply declares that the Indian rights retained by them in their May 1888 agreement were impliedly reserved against the State of Montana by the United States when Montana was admitted to the Union. Efforts to blur the main thrust of the *Winters* opinion is unworthy of the high degree of skill and diligence required of the Justice Department. See above, “Immemorial Indian Rights” pages 42 et seq., footnote 99 reviewing full history of *Winters* facts and law.

¹⁷¹See above, page 44 et seq.

that adjudication. Hallmark of that erroneous presentation to the Supreme Court is this statement: "Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the public domain * * * *Arizona v. California*, 373 U.S. 546, 595-601."¹⁷² "Reserved rights" have not been defined as the Justice Department states, in *Arizona v. California*,

¹⁷²APPENDIX, Page 2—Petition for Certiorari; Note: Appendix, pages 1, 2-3; 19, 20-21. An all-pervasive error in the Justice Department's presentation to the Supreme Court is this variously repeated statement predicated almost exclusively upon the Indians' *Winters Doctrine* as enunciated by the Supreme Court in the year 1908: "* * * the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601; *Winters v. United States*, 207 U.S. 564; *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-337, 339-340 (C.A. 9). In *Winters*, where the United States asserted this right with respect to an Indian reservation, this Court said (207 U.S. at 577): [T]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be. *The United States v. The Rio Grande Ditch and Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. * * *"

[What the Highest Court actually stated, but Justice Department does not recite: "The Government is asserting the rights of the Indians" (207 U.S. 546, 576 (1908))—not of the United States—vastly different propositions. As is reviewed, *Winters Doctrine* Indian rights to the use of water are under concerted attack because of their great value. If this failure to distinguish Indian private rights from federal reserved rights weakens the principles of the *Winters Doctrine*, the Indians can be more easily deprived of their rights either by legal or illegal seizure.]

Every case cited pertains either exclusively to Indian rights or, as in the case of *Arizona v. California*, predominantly to Indian rights. Yet the Justice Department in error declares the United States "has the right to use" that water. Those are Indian rights, private in character, held in trust by the United States for the benefit of the Indians—not as the Justice Department says, for the "use" of the United States.

or elsewhere. That Court in the last mentioned citation did not declare the "reserved rights" were for the "United States to use." On the first page of the citation in the last quoted excerpt from *Arizona v. California*¹⁷³ the Court specifically referred to the mainstream Congressional and Executive Order Indian Reservations and recited: "The Government, on behalf of five Indian Reservations in Arizona, California and Nevada, asserted rights to water in the mainstream of the Colorado River." Repeatedly the Justice Department is misrepresenting principles enunciated in the decisions adjudging and declaring Indian rights to the use of water citing the 1963 Supreme Court decision of *Arizona v. California*.¹⁷⁴

It is essential carefully to review the precise language of that decision. Reject out of hand the Justice Department assertion that the Court declared Indian rights to the use of water entitled the "United States to use" Indian water. That misstatement cannot be found either expressly or impliedly in *Arizona v. California* or any other decision. In the 1963 decision, having reiterated and reaffirmed the tenets of law upon which the American Indian Rights to the use of water are predicated, as reviewed above,¹⁷⁵ what the Court did say was this: "* * * the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests."¹⁷⁶ That power of the National Government to exercise rights to the use of water, title to which resides in it,

¹⁷³373 U.S. 546, 595 (1963).

¹⁷⁴Id. at 595-601.

¹⁷⁵See *supra*, page 37 et seq.

¹⁷⁶373 U. S. 546, 601 (1963).

in connection with withdrawn public domain—subject to any rights acquired antecedent to withdrawal, says the Court, stems from “* * * the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution.”¹⁷⁷

It is reiterated: There is not a single authority to support the Justice Department statement in regard to either the immemorial rights of the Indians or their invested rights, which entitled “* * * the United States * * * to use * * *” Indian water. That fact gave rise to the demand from one of the Nation’s outstanding law firms in the field of Indian law, to the Justice Department: “We request that in future briefs filed by the United States in these cases the United States call the attention of the Supreme Court to the error in the statements heretofore made in the briefs filed in Docket No. 87 [*Eagle River Adjudication*].”¹⁷⁸ As reviewed above, response to that demand to correct “the error in the statements” to the Supreme Court was the cryptic footnote discussed above, Failure to correct that mistake as requested in the last quoted excerpt, shocks the conscience. For the future not only of the Indian people but for the Nation as a whole, that adamant refusal by the Justice Department correctly to present a legal proposition to the Supreme Court, evidences a sinister amorality due to the inherent conflict of interest within that Department, in which, as the President stated to Congress, “No self-respecting” law firm would engage.¹⁸⁰

¹⁷⁷Arizona v. California, 373 U.S. 546, 597-598 (1963).

¹⁷⁸APPENDIX, Page 73.

¹⁸⁰See above, page 63, “Presidential Condemnation of ‘Inherent Conflict of Interest’ respecting American Indian rights which pervades Justice Department * * *.”

- (c) *Denigration of Indian rights to the use of water would be accomplished by reversal of Indian authorities by needless request to "reaffirm" Winters and other Indian decisions*

Having misstated to the Supreme Court the law respecting Indian rights to the use of water, the Justice Department, without reason or justification, requests the Supreme Court to "reaffirm" the Indians' *Winters Decision* and others. This odd language preceding that needless request in regard to the misstated legal proposition requires specific reference. Justice stated to the Highest Court: "While the Colorado Supreme Court has not specifically denied the existence of federal reserved water rights in Colorado or elsewhere in the West, its statements casting doubt on their existence underline our concern that State courts and State law together would, in fact, eliminate such rights."¹⁹⁰ As emphasized above, the principles of law reiterating and reaffirming the *Winters Doctrine* concepts as related to invested Indian rights to the use of water, were announced by the Court as recently as 1963 in *Arizona v. California*.¹⁹¹ Continuing, the Justice Department, having admitted that the Colorado Supreme Court did not deny the principles of the *Winters Doctrine*¹⁹² but stated in effect—wait until the trial on the merits—says this to the Supreme Court: "For this reason, we urge this Court specifically to reaffirm the principle that the United States has reserved water rights in the western States, including Colorado and other States with similar constitutional provisions."¹⁹³

¹⁹⁰ APPENDIX, Page 22.

¹⁹¹ See above, page 52 "(3) American Indian invested rights to the user of water".

¹⁹² APPENDIX, Page 15.

¹⁹³ APPENDIX, Page 22.

For the Justice Department to invite a challenge to the principles of Indian law in the "state of Colorado and other States with similar constitutional provisions"¹⁹⁴ while denying Indian interests, underscores the gravity of the problems confronting the Indian people by these adjudications. Failure properly to present the nature of the Colorado State police regulations enacted into law by the Colorado legislature is one of the gravest deficiencies of the Justice Department's brief. It is manifest, as will be reviewed, that Colorado's authority to provide methods for persons and corporations within Colorado's jurisdiction for acquiring and having administered their rights to the use of water cannot be construed to apply to Indian rights to the use of water or to subject them to that type of police regulation by the State. Indeed, it would be unconstitutional, as will also be emphasized, to subject the Nation's lands or rights to the use of water to Colorado's police regulations whether they stem from a constitutional proviso of the State or State statutes. Failure of the Justice Department to discuss—indeed, to mention—those basic propositions of law highlights the deficiencies of its presentation to the Supreme Court.

(d) *Denigration of Indian rights by Justice Department greatly aids Reclamation Bureau and other agencies which invade Indian rights to obtain, without legal authority, the water supplies for their projects*

From its inception Interior's Reclamation Bureau has invaded Indian rights to the use of water for its projects. There have been chronicled some of the Reclamation projects which constitute crass seizure of Indian

¹⁹⁴APPENDIX, Page 15.

rights to the use of water.¹⁹⁵ Planned destruction of Pyramid Lake by the Reclamation Bureau is a prime example of that Bureau's wanton invasion of Indian rights. Adamant refusal to protect Indian rights to the use of water by the Justice Department has greatly aided Reclamation in its course of outrageous conduct against the Indians.¹⁹⁶

Most recent events in the cooperation of the Justice Department with Reclamation interests in the seizure of Indian rights to the use of water are reviewed by the above mentioned study of the Senate Committee on the Judiciary.¹⁹⁷ That report reveals the expenditure by Reclamation of millions of dollars in constructing a non-Indian project through the commitment and use of rights to the use of water decreed to the Yakima Indians.¹⁹⁸ A review of the invasion by the Reclamation Bureau of the Pueblo rights to the use of water on the Rio Grande is instructive of the all-pervasive amorality of that Bureau and the Justice Department's cooperation with it.¹⁹⁹

Threat to the rights to the use of water of the Agua Caliente Tribe of Palm Springs, California, by the Corps of Engineers, Department of the Army, is a matter under study at the present time. Invasion of the Indians' rights by the Bureau of Land Management and the Bureau of Sport Fisheries and Wildlife, Department

¹⁹⁵"Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development" * * * 91st Cong. 1st Sess., pp. 493 et seq.

¹⁹⁶Id. at page 497 et seq. "Destruction of Pyramid Lake * * *"

¹⁹⁷A Study of Administrative Conflict of Interest * * * Reid Peyton Chambers, 91st Cong. 2d Sess. page 9.

¹⁹⁸Id. at page 17.

¹⁹⁹Id. at page 18 et seq.

of the Interior, have been analyzed in detail.²⁰⁰ Reclamation's Central Arizona Project being constructed without a water supply, is but another example of a grievous threat to the existence of the Colorado River Indians.²⁰¹

Justice Department attempts—but fails—to represent the American Indians whose rights are seized and encroached upon by the same Federal agencies which it vigorously supports against the Indians.

Retraction by the Justice Department of its misrepresentation to the Supreme Court of its definition of "reserved rights" is essential. Its adamant refusal to act on the basis of its legal and moral obligations constitutes a full disclosure of the inherent conflict of interest which the President condemned, all as has been reviewed.²⁰²

**FAILURE OF THE JUSTICE DEPARTMENT
PROPERLY AND ADEQUATELY TO REPRESENT
THE AMERICAN INDIAN PEOPLE
BEFORE THE SUPREME COURT AND IN
THE COURTS BELOW RESPECTING 43
U. S. C. 666²⁰³**

There have been reviewed above salient facts and principles of law relating to the American Indian in-

²⁰⁰Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Congress, 1st Session, * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, p. 497 et seq.

²⁰¹See above page 35.

²⁰²See above pages 63 et seq.

²⁰³See APPENDIX, page 1 et seq.: 43 U.S.C. 666:

Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs—

Consent is given to join the United States as a defendant in

(This footnote is continued on the next page)

terests before the Supreme Court and in the courts below in the two adjudications which are the subject matter of this consideration. Two elements are involved: (1) Indian title to rights to the use of water in the main stream of the Colorado River and its tributaries;²⁰⁴ (2) The precedents, Nationwide in scope, that must be expected by any decision of the Supreme Court whether it accepts or rejects the Justice Department's position in regard to the immunity of "reserved rights" as erroneously defined by that Department to the Supreme Court.²⁰⁵ Cryptic nature of the Justice Department denial of Indian interests to the Supreme Court in its footnote reference, must be condemned.²⁰⁶ Yet, as stated above, the footnote is subject to understanding when read in the light of the all-pervasive inherent conflict of interest which subverts the activities of the Justice Department respecting its responsibilities to the American Indians.²⁰⁷

Comprehension of the threat to the Indian interests requires further analysis of the second sentence of the

any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof in the same manner and to the same extent as a private individual under like circumstances: *Provided*, that no judgment for costs shall be entered against the United States in any such suit.

²⁰⁴Pages 10 et seq.; pages 37 et seq.

²⁰⁵Pages 66 et seq.

²⁰⁶APPENDIX, Page 79, footnote 3.

²⁰⁷APPENDIX, Pages 66 et seq.

cryptic footnote. To the Supreme Court Justice Department says that if it should decide that 43 U.S.C. 666 is applicable to the "federal reserved rights" which that Department has incorrectly defined to include Indian rights "* * * there would remain the further question (not presented by this case) whether" 43 U.S.C. 666 "* * * covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public."²⁰⁸ That the Justice Department, Respondents and Amici Curiae proceeded upon the basis that the Indian rights were before the Court until forceful Indian objection was interposed to the Solicitor General, is too clear for doubt—hence, the record can only safely be read as including Indian rights.²⁰⁹ As emphasized, the almost total reliance upon Indian law respecting their rights to the use of water belies the footnote representation to the Supreme Court. Underscoring the tenuousness of the Justice footnote is the repeated erroneous statement that "reserved rights" were defined by the Supreme Court as meaning "the entitlement of the United States [not the Indians] to use water * * *."²¹⁰

Specific reference in the footnote to "treaty" rights in itself constitutes a grave peril to the rights of the American Indians whose rights are predicated upon Executive Orders and Acts of Congress.²¹¹ Increasing that peril to the Indians on the main stream of the

²⁰⁸See above, pages 4, 5 et seq.; pages 79 et seq.

²⁰⁹See above, pages 10 et seq.

²¹⁰See above, pages 7 et seq.; pages 66 et seq.

²¹¹See above analysis of Indian Treaty rights "Immemorial rights" and Indian "Invested rights", pages 37 et seq.; pages 52 et seq.

Colorado River²¹² is the specific declaration of the Supreme Court that those rights stem from Executive Orders and an Act of Congress²¹³—not treaties. It is, moreover, the citation set forth below in which the Justice Department—in error—states the Supreme Court defined “reserved rights” entitles the United States—not the Indians—to “use” the waters thus reserved.²¹⁴ On that background reference will be made to the principles which preserve the immunity of the Indian rights to the use of water from suit, irrespective of the ultimate disposition of the issues presented to the Supreme Court for determination.

(a) *American Indian rights to the use of water are immune from the application of 43 U.S.C. 666*

“These Indian Nations are exempt from suit without Congressional authorization.”²¹⁵ That quoted excerpt from a keystone decision by the Supreme Court in regard to Indian immunity from suit is controlling in regard to 43 U.S.C. 666. The Indian rights to the use of water do not come within the purview of it.

Recently Arizona’s Supreme Court said this specifically in regard to the Colorado River Indian Tribe, which has rights in the main stream of the Colorado River decreed to it by the Supreme Court:²¹⁶

“An impressive body of law has developed recognizing the immunity of Indian tribes from suit.”²¹⁷

²¹²See Plate I and facing sheet.

²¹³Arizona v. California, 373 U. S. 546, 596 et seq. (1963).

²¹⁴APPENDIX, Page 2 “Statement” second full paragraph.

²¹⁵United States v. United States Fidelity Co., 309 U.S. 506, 512 (1939).

²¹⁶See Plate I and facing page; See page 21 et seq.

²¹⁷Morgan v. Colorado River Indian Tribe, an organized Indian Tribe, 103 Ariz. 425; 443 P.2d 421, 423 (1968).

Following a recitation of the numerous authorities on the subject the Arizona court, regarding the Colorado River Indian Tribe, said this:

"It is clear that Congress alone must determine the extent to which immunities afforded trial status are to be withdrawn."²¹⁸

A condition precedent to subjecting Indian rights to the use of water to State court jurisdiction, adjudication, control and administration, which is wholly lacking in 43 U.S.C. 666, is precise action by Congress in regard to those Indian rights. Supporting that conclusion is this statement from a frequently cited decision in regard to the Choctaw Tribe of Indians: "* * * Being a domestic and dependent state, the United States may authorize suit be brought against it. But for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interest, as well as the interests of the [Indian] Nation seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nations and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states."²¹⁹

In declaring the Colorado River Indian Tribe immune from suit the Arizona court cited first and favor-

²¹⁸Morgan v. Colorado River Indian Tribe * * * 103 Ariz. 425; 443 P.2d 421, 424 (1968).

²¹⁹Thebo v. Choctaw Tribe of Indians, 66 Fed. 372, 375 (C.A. 8, 1895).

ably the *Choctaw Case*.²²⁰ Recently the numerous Supreme Court cases and others were cited underscoring the Indian immunity from suit involving the Chippewas: “* * * Indian tribes under the tutelage of the United States are not subject to suit without the consent of Congress * * *.”²²¹ Important to the Colorado Indians is the principle that even where there has been a waiver of Indian immunity, it is strictly construed.²²²

In clear and concise terms the Supreme Court stated the reason for the necessity of a precise and specific waiver of sovereign immunity by the Congress before that Indian immunity could be withdrawn: “It is as though the [Indian] immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits.”²²³ The Supreme Court then re-emphasized the need for explicit waiver of immunity by Congress if it was to withdraw the Indian immunity from suit: “The Congress has made provision for cross-suits against the Indian Nations by defendants. This provision, however, is applicable only to ‘any United States court in the Indian Territory.’”²²⁴ As the parties attempting to proceed by court action against the Indians failed to come within the limited scope of that waiver, their suit was

²²⁰*Morgan v. Colorado River Indian Tribe* * * * 103 Ariz. 425; 443 P.2d 421, 423 (1968).

²²¹*Twin City Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (C.A. 8, 1967).

²²²See *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (C.A. 10, 1957).

²²³*United States v. United States Fidelity Co.*, 309 U.S. 506, 512-513 (1939).

²²⁴*Id.*, at 513.

dismissed for want of jurisdiction by the Supreme Court.

A caveat important here was then declared by the Highest Court: “* * * it is said that there was a waiver of immunity by a failure to object to the jurisdiction [in the courts below].” Rejecting that error by Federal lawyers, the Court said this: “It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.”²²⁵ Failure of the Federal officials properly to interpose the objection to suit against the Indians did not preclude raising the issue in the Highest Court: “As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power.”²²⁶

Efforts to subject the American Indians to State courts in regard to their rights to the use of water—in that manner to deprive them of their rights—is very much a part of the Indian struggle for survival in Western United States. An authority in point on the subject reviews the efforts and rejects the attempt:

“We next notice the court’s conclusion that a 1925 state court adjudication of the respective rights of the white landowners as between them-

²²⁵United States v. United States Fidelity Co., 309 U.S. 506, 513 (1939).

²²⁶Id., at 514.

selves to the 75 percent of the flow of Ahtanum Creek, which had been allotted to them in the 1908 agreement, was a proceeding 'which binds the United States and bars any claim to that portion of the flow.' * * * The United States was not a party to that suit, although as the pretrial order recites, it had knowledge that the adjudication was proceeding and it had an opportunity to appear therein but decided against it. It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444.²²⁷

That 43 U.S.C. 666, whatever it means, relates solely to the rights of the United States held for the public—not the private rights of the Indians held in trust for them—is clear from the express language of that quoted statute. Equally clear is that Congress did not subject the American Indian rights to the police regulations of the States in regard to jurisdiction, adjudication, control and administration.

- (b) *Immunity of American Indian rights to the use of water from State police regulation, jurisdiction, adjudication, control and administration, has not been waived by the Congress under 43 U.S.C. 666 or otherwise*

Deficiencies pervade the Justice Department's presentation in the Supreme Court and the courts below

²²⁷*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 328 (C.A. 9, 1956), Appellees' Cert. denied 352 U.S. 988 (1956); 330 F.2d 897 (1965) 338 F.2d 307; Cert. denied 381 U.S. 924 (1965).

as to the nature of the control purportedly exercised by Colorado over rights to the use of water within the scope of its jurisdiction. It is elemental that Colorado has no proprietary interest in the rights to the use of water in its streams. Indeed, the Colorado courts make no reference to title to rights to the use of water but relate only to "water".²²⁸ It is elemental that "water" is vastly different from the rights to use water.²²⁹ It is, of course, within Colorado's power to declare, as it did, that the principles of the doctrine of prior appropriation would adhere in that State. That declaration was in the proper exercise of the police power of the quasi sovereign.

At an early date Colorado's Supreme Court placed in proper perspective the character of the power which it exercises in regard to rights to the use of water. Respecting its regulations to adjudicate rights, the Colorado court emphasized: "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, * * *."²³⁰ The Supreme Court of the United States in the first *Arizona v. California* decision²³¹ said this in regard to efforts to apply Arizona's police regulations respecting rights to the use of water, to the National Government:

"[Arizona's] statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer * * *. The United States has not secured such approval; nor has any ap-

²²⁸See APPENDIX, Page 15.

²²⁹See above, pages 37 et seq.

²³⁰*Nichols v. McIntosh*, 19 Colo. 22; 34 Pac. 278, 280 (1893).

²³¹*Arizona v. California*, 283 U.S. 423, 451 (1930).

plication been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

"The United States may perform its functions without conforming to the police regulations of a State. * * * Wilbur is under no obligation to submit the plans and specifications to the State Engineer for approval."

It is undeniable that Colorado has never taken any steps to acquire rights to the use of water. From the same source in regard to the immunity of the National Government from Arizona's police regulations, this statement is taken, which fully evidences that Colorado did not acquire rights in the "water" alluded to in its Constitution:

"To appropriate water means *to take* and *divert* a specified quantity thereof and put it *to beneficial use* * * * and, by so doing, to acquire * * * a vested right *to take* and *divert* from the same source, and to use and, consume the same quantity of water annually forever, subject only to the right of prior appropriations. * * * *the perfected vested right to appropriate water flowing* * * * *cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use.*" (Emphasis supplied)²³²

Federal and State courts throughout Western United States on repeated occasions proceeded on the sound legal predicate that State regulations respecting rights to the use of water stem from police power and not

²³²Arizona v. California, 283 U.S. 423, 459 (1930).

from proprietary ownership of the rights. Utah's Supreme Court says this on the subject:

"The statutory declaration that 'the water of all streams and other sources in this State * * * is hereby declared to be the property of the public' *does not vest in the state title or ownership of the water as a proprietor*. It is a community right available to all upon compliance with the law by which that which was once common to all may be brought within the domain of private right to use, or under certain circumstances private and exclusive possession and ownership." (Emphasis supplied)²³³

Bizarre nature of the contention that Colorado could seize by its Constitutional provision all of the Nation's rights to the use of water is demonstrated by the cited authorities. There is the travesty, if the concept is not rejected, of having virtually every jurisdiction in the Colorado River Basin, with the exception of Colorado, denying that the State "owns" in a proprietary sense

²³³Wrathall v. Jackson, 86 Utah 50; 40 P.2d 755, 777 (1935); Vineyard Land & Stock Co. v. District Court of Fourth Judicial District of Nevada, 42 Nev. 1; 171 Pac. 166, 173, 174 (1918); Pacific Live Stock Company v. Lewis, 241 U.S. 440, 448, 449 (1915); Farm Investment Co. v. Carpenter, 9 Wyo. 110; 61 Pac. 258, 260 (1900); Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121; 138 N.W. 171, 179 (1912); In re Willow Creek, 74 Ore. 592, 144 Pac. 505, 513, 514 (1914); Farmers Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513; 45 Pac. 444, 449 (1896); Farmers' High Line Canal & Reservoir Co., et al., v. Southworth, 13 Colo. 111, 134; 21 Pac. 1028, 1031 (1889); California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 562, 567 (C.A. 9, 1934); affirmed 295 U.S. 142 (1934). Note: The Supreme Court did not find it necessary to pass on the particular question of the power of the legislature to modify allegedly vested riparian rights but affirmed on other grounds. 3 Kinney on Irrigation and Water Rights, 2d ed., sec. 1341, pp. 2428, 2429. 2 Wiel, Water Rights in the Western States, 3d ed., sec. 1184, p. 1097.

all rights to the use of water of the Colorado River. The late L. Ward Bannister, an outstanding lawyer with respect to rights to the use of water in the State of Colorado, rejected in these terms the fallacy that Colorado could own "the water of the streams within the state" and that the other States did not own "the water": "If this be the only theory of supporting a power in the state to dispose of the waters, only some of the states would have the power, for only some have constitutional character."²³⁴ If Colorado by its Constitutional proviso seized all of the rights to the use of water within that State upon its admission, then the American Indians in the Colorado River Basin are confronted with a catastrophe for, as shown above, seventy percent (70%) of all of the water in the Colorado River drainage rises within that State and the Colorado decision, of course, has statewide application.²³⁵

(1) *Indian immunity from State police control guaranteed by the Constitution*

Immunity of Indians from State police control is basic and has long been recognized by the Supreme Court. On the subject that Court has declared: "Congress has also acted consistently upon the assumption

²³⁴Bannister, *The Question of Federal Disposition of State Waters in Priority States*, 28 Harv. L. Rev. 270, 279 (1915). At p. 283, 287-88; citing the Colorado Constitution, (Colo. Const. art. XVI, sec. 5) Mr. Bannister continued: "Some of the Colorado doctrine common wealths, bent on putting the waters as far as possible beyond the control of the federal government, have adopted constitutional provisions declaring the waters to be the 'property of the public' or the 'property of the state.' Even these provisions which are substantially the same in effect are not considered as vesting the state with any property right in the waters or in their use but affirming sovereign jurisdiction over them."

²³⁵See above, pages 23 et seq.

that the States have no power to regulate the affairs of Indians on a reservation."²³⁶ Continuing, in regard to Indian Immunity from State police regulations the Court declared:

"Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied."²³⁷

It was, of course, in *Worcester v. Georgia*²³⁸ that the Constitutional immunity from State control was established, although in that case it was illegally abridged by the executive branch of the Federal Government.

Great significance must also be ascribed to the *Williams* case from which the preceding quotations have been taken. The northern portion of the Navajo Reservation is almost entirely dependent upon the "water" of the San Juan River which flows out of the State of Colorado.²³⁹ If Colorado has seized the "water" of the San Juan River and its drainage within Colorado, it has clearly violated the Navajo Treaty of 1868.²⁴⁰ That it has not seized those waters by its police regulations is too clear for question. Yet by failing to distinguish Indian rights to the use of water—private in character—from public rights, the Justice Department has imperiled the Navajo and all Indian rights.²⁴¹

²³⁶*Williams v. Lee*, 358 U.S. 217, 220 (1958).

²³⁷*Id.* at 221.

²³⁸31 U.S. 515 (1832).

²³⁹See Plate I.

²⁴⁰15 Stat. 667.

²⁴¹See above, pages 6 et seq.; pages 66 et seq.

- (2) *Failure of Justice Department to challenge as obiter dictum the Colorado decision of Stockman v. Leddy; failure to assert that Colorado's Constitutional proviso is simply a police regulation of "water"—not a claim of proprietary interest*

In declaring Congress had subjected the Nation's rights to the use of water to State control by 43 U.S.C. 666, Colorado's Supreme Court, among other things, said this:

"We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."²⁴²

That Colorado decision is of transcendent importance to the American Indians and the Nation as a whole.

Failure of the Justice Department to analyze the case of *Stockman v. Leddy*²⁴³ is demonstrative of its unusual approach to the key issues in the two adjudications. Without attempting to review the actual decision, the Justice Department says this:

"The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution which the Colorado Supreme Court, in *Stockman v. Leddy*, 55 Colo. 24, construed as an assertion of

²⁴²APPENDIX, Page 15.

²⁴³55 Colo. 24; 129 Pac. 220 (1912).

ownership of all unappropriated waters within its borders, does not preclude ownership by the United States of reserved water rights in Colorado. *Arizona v. California*, 373 U.S. 546, 597-598."²⁴⁴

Facts of *Stockman v. Leddy* are simple. These excerpts are taken from it:

"The immediate object of this action in mandamus by Stockman against the Auditor of State is to compel the latter to issue to him a warrant in the sum of \$55.75 for services which he rendered to a joint legislative committee created by an act of our General Assembly. Session Laws of 1911, p. 671, c. 227. The principal purpose of the action, however, appears to be to determine the constitutionality of the statute."²⁴⁵

Having reviewed the cited Act, the Colorado Supreme Court stated it was "* * * a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members." Hence said Colorado's Court: "This is contrary to article 3 of our Constitution * * *" which divided the powers of the State of Colorado into "* * * legislative, executive and judicial * * *" ²⁴⁶—not very unusual. Having thus ruled on the issue before it, Colorado's Supreme Court did not allow payment of the \$55.75. Incidental fact was that the claimed \$55.75 pertained to an authorization by Colorado's legislature to investigate and take action in connection with the activities of the "* * * Reclamation Service and the

²⁴⁴APPENDIX, Page 22.

²⁴⁵*Stockman v. Leddy*, 55 Colo. 24; 129 Pac. 220, 221 (1912)

²⁴⁶*Stockman v. Leddy*, 55 Colo. 24; 129 Pac. 220, 223 (1912).

Forest Service of the Federal Government" as those activities related to the "* * * right of this state to control the distribution of the waters * * *" within the State.²⁴⁷

Stockman v. Leddy reviews the Constitutional provision of the State. It quotes this excerpt from the provision: "The water of every natural stream, not heretofore appropriated, within the state of Colorado is hereby declared to be the property of the public * * *". It is to be observed, as reviewed in detail above, that the Constitutional proviso relates to "water" dedicated to the "public". On that background the court stated "* * * the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that this right to their distribution and control within its borders is free from interference by any other sovereignty."²⁴⁸ Fundamentally the Supreme Court of Colorado applied the basic precepts of the law reviewed in detail above—that the States under their police power undoubtedly have authority to provide for the acquisition of rights in and the distribution of the waters under their jurisdiction. The Supreme Court of Colorado did not state that Colorado owned rights to the use of water—the usufructuary right which is an interest in real property²⁴⁹—in a proprietary sense. It is clear that Colo-

²⁴⁷Id. at 221.

²⁴⁸Id. at 222.

²⁴⁹See above, page 37. Utah's Supreme Court stated that elemental proposition very well in these terms: "Water flowing in a natural stream or in a ditch is not subject to ownership so far as the corpus of the water is concerned." *Bear Lake & River Waterworks Irr. Co. v. Ogden*, 8 Utah 494, 33 Pac. 135 (1893). See 1 Wiel, *Water Rights in the Western States*, 3d ed. Secs. 18-19.

Colorado's constitutional proviso was simply an exercise of its police power regarding matters within the purview of its authority. Hence there is no basic conflict with the power of the Federal Government to exercise its rights to the use of water in Colorado independent of State interference.²⁵⁰

Failure to raise the issue of the nature of Colorado's police regulation interest in the "water" within that State is one of the most grave deficiencies in the Justice Department's conduct of the entire proceeding from the lowest to the Highest courts. Attendant upon that total inadequacy of presentation is the grave Constitutional questions next to be considered.

(3) *Congress did not—could not—delegate its Constitutional Trust obligation to American Indians to States by 43 U.S.C. 666*

Congress, as stated, did not subject American Indian rights to the use of water by its enactment of 43 U.S.C. 666, to State control.²⁵¹ As the President in his July 8, 1970, message to Congress recognized, those rights to the use of water are protected by the Trust responsibility this Nation owes to the Indians.²⁵² Indeed, Congress could not abrogate this Nation's Trust obligation respecting Indian rights to the use of water for that obligation was delegated to and accepted by the Nation under the Constitution.²⁵³ It is, of course,

²⁵⁰See above, page 68—"Immunity of American Indian rights to the use of water from State police regulation, jurisdiction, adjudication, control and administration, has not been waived by the Congress under 43 U.S.C. 666 or otherwise.

²⁵¹See above, page 86, et seq.

²⁵²See above, pages 63 et seq.

²⁵³See Constitution of the United States 1787, Art. I, Sec. 8, Cl. 3; See Federal Encroachment on Indian Water Rights and
(This footnote is continued on the next page)

an elemental proposition of law that Congress cannot delegate the Constitutional powers or responsibilities.²⁵⁴ That Congress did not purport to do so is clear from the explicit language of 43 U.S.C. 666.

Omitting reference to the Constitutional prohibition against the delegation of Trust obligation by the Congress, is but one aspect of the Justice Department's grave damage to the Indians by that Department's failure to bring to the Court's attention the Indian rights in the Colorado River and its tributaries while relying almost exclusively upon Indian law relative to the issues before the Court. Any attempt to assert that 43 U.S.C. 666 is applicable to the Indian rights to the use of water must be barred by the principle that the Congress did not intend to and could not delegate to the States the power to exercise jurisdiction over Indian rights.

(4) *Failure by Justice Department to raise most elemental proposition of statutory construction —43 U.S.C. 666 does not and could not have retrospective effect subjecting the Nation's or the Indians' rights to decrees to which it was not and could not be made a party*

Congress did not intend 43 U.S.C. 666 to have retrospective effect. Yet the entire course of conduct by the Justice Department in the proceeding in the Supreme Court and those in the courts below, proceeds

the Impairment of Reservation Development, 91st Congress, 1st Session, * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, pages 477 et seq.

²⁵⁴See 79 L.Ed. 476; *Schechter Corp. v. United States*, 295 U.S. 495, 537 (1934); *Field v. Clark*, 143 U.S. 649, 692 (1891); *Butte City Water Company v. Baker*, 196 U.S. 119, 126 (1905); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163, 164 (1919).

in disregard of those basic tenets of the law—tenets of the law which are of necessity controlling.

Nature of the *Eagle River Adjudication* and *Water Division No. 5 Adjudication* as they pertain to the rights of the American Indians and the Nation as a whole in the main stream of the Colorado River and its tributaries, has not been clearly stated. Facts respecting those proceedings are vital to a correct evaluation of the course that has been followed by the Justice Department in them. Regarding the *Eagle River Adjudication*, Colorado's Supreme Court said this: "There have been a number of previous adjudications in this water district. The decree in the original adjudication was

entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings."²⁵⁵

Upshot of applying 43 U.S.C. 666 to decrees entered eighty years ago is to attempt an erroneous interpretation of that statute as being retrospective in operation. That attempt to apply the law to Colorado's State decree dating back eighty years must be contemplated in the light of these additional rulings by the Colorado Court:

"We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights."²⁵⁶

²⁵⁵APPENDIX, Page 12.

²⁵⁶APPENDIX, Pages 12, 15.

Continuing, the Colorado Court stated in regard to its determination that 43 U.S.C. 666 subverted the Nation's rights to decrees eighty years old:

"* * * These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."²⁵⁷

Later in its decision the Supreme Court of Colorado ruled, in a purely advisory feature of its opinion—advisory because the issues were not before it as revealed by the last quoted excerpts:

"The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the date of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights.
* * * We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration."²⁵⁸

Substance of that statement—albeit advisory and in total error—is that 43 U.S.C. 666 subjected the United States to proceedings, facts and law, which were tried upwards to one hundred years ago. That the United States would have no right to cross-examine witnesses a long time dead; to appeal from judicial errors which probably cried out for reversal, demonstrates the fallacy of the advisory opinion. Let this fact be emphasized: Congress did not contemplate that type of confiscation of the Nation's rights to the use of water when it enacted 43 U.S.C. 666.

²⁵⁷ APPENDIX, Pages 12, 15.

²⁵⁸ APPENDIX, Pages 12, 17.

Let this fact be likewise emphasized: American Indians in the Colorado River Basin cannot survive that type of conduct in the proceedings within the State of Colorado for, as reviewed, Colorado constitutes their primary source of water supply.²⁵⁹

From the express language of 43 U.S.C. 666²⁶⁰ it is evident that it is prospective, not retroactive, in its operation. It is, of course, elementary that retrospective statutes exist only when Congress expressly declares that type of operation of them, and they cannot then invade property rights, particularly those of the American Indians whose rights are held in trust by the United States.

It is a basic precept of the law governing statutory construction that enactments will not be accorded retroactive application unless there has been a clear mandate of the legislative body directing the law be applied in that manner. A review of the express language of 43 U.S.C. 666 discloses no such mandate from Congress.

"Legislative enactments will not be construed as retrospective in their operation, even when permissible, unless it is clear they were intended to do so. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties or will affect or interfere with their antecedent rights. It is founded on the soundest principles of public policy and its reason is manifest."²⁶¹

²⁵⁹See above, page 23.

²⁶⁰APPENDIX, Page 1.

²⁶¹United States v. McPhee, 51 Colo. 425, 431; 118 Pac. 996 (1911).

Colorado's Supreme Court has stated:

"One of the contentions of the city is that this [law] cannot have a retroactive effect unless there is an express declaration in the statute so providing. We think that contention is sound. * * * It is a fundamental rule, supported by numerous decisions, that statutes are not to be construed as having a retroactive effect unless the purpose and intention of the legislature to give them a retroactive effect clearly appears."²⁶²

Adopting virtually the same language as the State court, the Supreme Court of the United States recently declared: "Retroactivity, even where permissible, is not favored, except upon the clearest mandate."²⁶³ That Court has likewise stated: "Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'"²⁶⁴

Citing the Colorado Constitution, Sutherland on *Statutory Construction* says this: "Because of the intuitive belief that there is something inherently bad in retroactive legislation, some states [including Colorado] have adopted express constitutional provisions against retroactive laws."²⁶⁵

²⁶²Denver v. Armstrong, 105 Colo. 290, 292; 97 P.2d 448 (1939).

²⁶³Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944).

²⁶⁴Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944).

²⁶⁵2 Sutherland, *Statutory Construction*, 3rd ed., Horack, Sec. 2204, p. 119, citing Colorado Constitution, Art. II, Sec. 11:

Ex post facto laws.—No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

Dissipation of invaluable rights to the use of water either those of the American Indians held in trust for them, or those of the Nation as a whole, was not intended by the Congress when it enacted 43 U.S.C. 666. Compliance with Colorado law would inevitably have that effect. As stated above, adjudication decrees were entered eighty years ago in the *Eagle River Adjudication*. That fact is, of course, equally applicable to the decrees in the *Water Division No. 5 Adjudication* which embraces the former adjudication.²⁶⁶ Most recent decree on the Eagle River, as Colorado's Supreme Court stated, was February 16, 1966.²⁶⁷ Under Colorado law the American Indians, if 43 U.S.C. 666 is applicable to them—which it is not—would lose priorities antecedent to one day subsequent to February 16, 1966—an irreparable damage to every Indian dependent upon waters arising in Colorado.²⁶⁸

Loss of priority in a river so grievously over-appropriated and contaminated as the Colorado, is tantamount to losing irreplaceable property rights. Priorities have long been recognized by Colorado's Supreme Court as invaluable property interests: “* * * this court has repeatedly held that priorities of right to the use of water are property rights. Such is the settled doctrine in this state. * * *

Property rights in water consist not alone in the amount of the appropriation, but also in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same

²⁶⁶See above, pages 1 et seq.

²⁶⁷APPENDIX, Page 12.

²⁶⁸See Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-22. Substance of that law was applicable prior to the 1969 amendment—See APPENDIX pages 76-77.

natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right; * * *."²⁶⁹

Emphasizing the sanctity of a priority to rights to the use of water the Colorado court stated: "*A priority of right to the use of water, being property, is protected by our constitution so that no person can be deprived of it without 'due process of law'*".²⁷⁰ (Emphasis supplied) Underscoring the principle that the priority to which a right to the use of water is entitled, is property, the Supreme Court of Colorado has likewise stated:

"It is elementary learning in Colorado that a water priority is a property right—not a mere revocable privilege; that it is not a fixed appurtenance; that the right to change its place of use and the point of diversion is an inherent property right, not conferred by our remedial statute, but pre-existing as an incident of ownership, and always enforceable so long as the vested rights of others are not injuriously affected."²⁷¹

The basic principles in regard to the real property nature of a priority to the use of water from a stream is adhered to throughout the arid and semiarid West.²⁷² A different rule would be suicidal where water is the very essence of life itself.²⁷³

²⁶⁹Nichols v. McIntosh, 19 Colo. 22; 34 Pac. 278, 280 (1893).

²⁷⁰Nichols v. McIntosh, 19 Colo. 22; 34 Pac. 278, 280 (1893).

²⁷¹Brighton Ditch Co., et al. v. City of Englewood, 124 Colo. 366, 237 P.2d 116, 120 (1951).

²⁷²Hutchins, The California Law of Water Rights, "Property Characteristic" pp. 120 et seq.

²⁷³Vonberg v. Farmers Irr. Dist., 132 Nebr. 12; 270 N.W. 835 (1937); Whitmore v. Murray City, 107 Utah 445; 154 P.2d 748, 751 (1944);

For summary on the subject see 1 Wiel, Water Rights in the Western States, 3d ed., Chap. 14, pp. 307 et seq.

Denial of the American Indians of their right to be heard before the Supreme Court in the *Eagle River Adjudication and Water Division No. 5 Adjudication*, in the light of their rights to the use of water within the State of Colorado, is tantamount to the destruction of the American Indians residing in the Colorado River Basin.²⁷⁴ Failure of the Justice Department adequately and properly to represent the American Indians, indeed, all of the people of the Nation, in the above mentioned proceedings, in regard to (i) the clear import of the Colorado Constitution which only claims regulatory authority, not proprietary title, in the "water within its boundaries"; (ii) the prospective, not retrospective, nature of 43 U.S.C. 666, whatever other force it may have, is, as stated, simply reflective of the "inherent conflict of interest" within that Department so severely condemned by the President in his July 8, 1970, Message to Congress. Conduct—offers to bargain—by the Justice Department in the Supreme Court and the courts below, in regard to the meaning and application of 43 U.S.C. 666 likewise falls far short of the President's demand that the Justice Department representing the Trustee United States, has the "legal obligation to advance the interests" of the American Indians "without reservation and with the highest degree of diligence and skill."²⁷⁵ That conduct will now be reviewed.

²⁷⁴See above, pp. 37 et seq.; pp. 52 et seq.

²⁷⁵Congressional Record, Senate, July 9, 1970, pp. S 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

- (5) *Failure of Justice Department to fulfill obligations by (i) offers to appear as plaintiff in State court proceedings asserting minuscule claims; (ii) to subvert on the basis of State lines, the Nation's rights to the use of water*²⁷⁶

Seeking to placate the powerful forces which desire to take from the people of the United States rights to the use of water in Colorado, the Justice Department has offered to bargain with those forces.²⁷⁷ Disaster will be visited upon the American Indians in the Colorado River Basin by the voluntary submission of the Nation's rights to the police regulations of Colorado in much the same degree as they will by that Department's failure properly or adequately to represent the Nation under 43 U.S.C. 666, all as reviewed above. Reject out of hand any assertion by the Justice Department that American Indian rights are not affected; subsequently may be adjudicated in other, later proceedings. Utah's Supreme Court contemptuously said this to the Justice Department's attempts to piecemeal Federally claimed rights, some of which were before it: "The United States accepts the decree as entered, but urges that in addition to the specific water rights it was awarded, the court should have recognized additional but unspecified water rights which may exist by virtue of Federal withdrawal of public lands and which the government may require for use in the future.

* * *

"It is thus magananimously conceded that private individuals have acquired their water rights adjudicated in this proceeding, but it is contended

²⁷⁶See above, pages 6 et seq.

²⁷⁷See above, page 8, paragraph (iii); APPENDIX, Pages 10-11.

that they must always be inferior and subordinate to rights which the government might decide at a later time to assert.

* * *

*"It is our opinion that the United States, having become a party seeking adjudication of its rights in this proceeding, wherein the court had jurisdiction of the subject matter and the parties, is bound by the judgment to the same extent as any other party. * * *"* (Emphasis supplied)²⁷⁸

In simple terms, the Justice Department is now and for many years, through failure properly to represent the Nation in litigation involving rights to the use of water—not only the rights of the American Indians—is causing the people of this country to lose invaluable, irreplaceable rights in the streams within its forest, park and recreational areas. This matter has previously been emphasized. In a memorandum dated January 28, 1964, entitled "Abridgment and Loss of Indians' Winters Doctrine Rights and Those of the Nation as a Whole" there was directed to the then Assistant Attorney General of the Lands Division, Department of Justice, a full review of the failure of the Justice Department adequately and properly to represent the United States in litigation involving the Indians' and the Nation's rights to the use of water. The principles reviewed there are equally applicable to the present phase of this consideration.

²⁷⁸In re Green River Adjudication v. United States of America, 17 Utah 2d 50; 404 P.2d 251, 252 (1965).

Voluntarily to submit to the police regulations under the circumstances offered—indeed, under any circumstances—is tantamount, as the Utah court explicitly ruled, to an outright abandonment of all rights including American Indian rights which are not asserted.

Bargaining on the basis that the Justice Department would submit, under 43 U.S.C. 666, to State control on a statewide basis, is clearly violative of the express language of part (1) of the Act, and the cases interpreting that Act.²⁷⁹ Under no circumstances should the American Indians agree that the Colorado River, short of water and polluted, should be segments by the laws of the seven Colorado River Basin States. There is no more rapid means of perpetrating another—perhaps last—outrage against the American Indians in that Basin and throughout Western United States.

DISMISSAL BY THE SUPREME COURT OF
THE *EAGLE RIVER ADJUDICATION* AND
THE *WATER DIVISION NO. 5 ADJUDICA-
TION* SHOULD ENSUE—PRINCIPAL PAR-
TIES ALREADY BOUND BY A FEDERAL
DISTRICT COURT DECREE—THE UNITED
STATES IS NOT A NECESSARY PARTY

- (a) *Failure of Justice Department to bring to the Supreme Court's attention a Federal Decree encompassing all of the drainage area of the main stream of the Colorado River in the State of Colorado*²⁸⁰

Incredible aspect of the Justice Department's conduct in the Supreme Court and in the Colorado courts

²⁷⁹See above, page 8, paragraph (iv); See pages 66 et seq.
²⁸⁰Civil Nos. 2782, 5016, 5017

In the United States District Court for the District of Colorado
(This footnote is continued on the next page)

is its failure to refer to the Final Decree and Final Judgment dated October 12, 1955, by the United States District Court for the District of Colorado. Parties to that Final Decree are most significant in the light of the present proceedings before the Supreme Court. As will be observed, they include: The United States of America v. [1] Respondent in Cases No. 87 and 812, The Colorado River Water Conservation District; [2] Respondent in Case No. 87, The City and County of Denver, a Municipal Corporation. All-encompassing

The United States of America, Plaintiff)	
v.)	
Northern Colorado Water Conservancy District, a)	
Quasi-Municipal Corporation of the State of)	
Colorado)	
The Colorado River Water Conservation District, a)	
Quasi-Municipal Corporation of the State of)	
Colorado;)	
The Palisade Irrigation District, a Quasi-Municipal)	Civil
Corporation of the State of Colorado;)	No. 2782
The City and County of Denver, a Municipal Cor-)	
poration;)	
The City of Englewood, a Municipal Corporation;)	
The City of Colorado Springs, a Municipal Corpo-)	
ration)	
The South Platte Water Users Association, a Public)	
Corporation of the State of Colorado;)	
Defendtns)	
Petitioners: Colorado River Water Conservation)	
District, The Grand Valley Water Users Associa-)	
tion, The Orchard Mesa Irrigation District, Palisade)	Civil
Irrigation District, and Grand Valley Irriga-)	No. 5016
tion Company; In the Matter of the Adjudication)	
of Priorities of Water Rights in Water District)	
No. 36 for Purposes of Irrigation)	
Petitioners: Colorado River Water Conservation)	
District, The Grand Valley Water Users Asso-)	
ciation, The Orchard Mesa Irrigation District,)	
Palisade Irrigation District, and Grand Valley)	Civil
Irrigation Company; In the Matter of the Adjudi-)	No. 5017
cation of Priorities of Water Rights in Water)	
District No. 36 for Purposes Other Than Irriga-)	
tion)	
Amendments to Judgment and Decree, if any.		

nature of that Final Decree in regard to the main stream drainage area of the Colorado River can be ascertained from a review of Senate Document No. 80, 75th Congress, which that Decree was entered to enforce. Plate II refers to the flow requirements under that Senate Document and Final Decree, at Shoshone and at the head of Grand Valley. If the Justice Department has abandoned that Final Decree against the Respondents, so important to the entire drainage area of the Colorado River, the Supreme Court of the United States must be advised. If the Justice Department has not abandoned that Final Decree, then it behooves that Department to inform the Supreme Court of it, and how it can be ignored in the two Adjudications under review.

Included with specificity in that Federal Court Decree are rights to the use of water of the Respondent City and County of Denver and whatever may be the interest of Respondent City and County of Denver and whatever may be the interest of Respondent Colorado River Water Conservation District. It pertained with specificity and with particularity to rights to the use of water in Colorado Water Districts No. 36 and 51. Yet the Justice Department recites this to the Supreme Court:²⁸¹

²⁸¹APPENDIX, Page 11.

"The United States, however, has recently been served in three additional supplemental adjudications:

- (1) W.D. 36, Dist. Ct., Summit Co., Civil No. 2371;
- (2) W.D. 51, Dist. Ct., Grand Co., Civil No. 1768; and
- (3) W.D. 52, Dist. Ct., Eagle Co., Civil No. 1548."

The Supreme Court must be advised as to the Justice Department's position respecting the Federally decreed rights of the United States as they pertain to those Districts. Does the Justice Department intend to subject part of the rights to the State court as a plaintiff as it has suggested, and have the vast and all-inclusive rights embraced in the 1955 Final Decree administered under the Federal Court's jurisdiction? Total confusion is no predicate for presenting to this Nation's Highest Court the all-important question of the applicability of 43 U.S.C. 666 as it pertains to the Colorado River and its tributaries within the State of Colorado. Yet that is the precise nature of the proceedings based upon the existing Federal decree binding on the principal Respondents before the Supreme Court.

Bizarre nature of the present status of the issues, in the light of the 1955 Federal Final Decree encompassing Water Division No. 5, including the *Eagle River Adjudication*, cannot be resolved from the record before that Court. Yet it is imperative that those issues be resolved if a total travesty is to be avoided. Any other course is unfitting for all parties concerned. For reasons reviewed in depth, the American Indians in the Colorado River Basin have a most vital and basic interest as their rights are gravely imperiled due to the fact that a large proportion of the entire flow of the Colorado River is involved.²⁸²

(1) *Odd course adopted by Respondents*

Respondent The Colorado River Water Conservation District is the only Respondent to file a brief in the *Water Division No. 5 Adjudication*.²⁸³ That is odd be-

²⁸²See above, pages 23 et seq.

²⁸³APPENDIX, Pages 86 et seq.

cause as reviewed above, *Water Division No. 5* includes the Eagle River. It is odd but in keeping with the general course of the proceedings. Does Denver contend there is a conflict with the United States under the old Colorado law—the *Eagle River Adjudication*—but no conflict with the United States under the new law—the *Water Division No. 5 Adjudication*; which includes the *Eagle River Adjudication*? How can the City and County of Denver, if it has a true interest in the *Eagle River Adjudication*, refrain from participating in *Water Division No. 5 Adjudication*? Perhaps the explanation is contained in the vagaries of the alleged claims of the City and County of Denver as spelled out in this footnote in the Respondent's brief in the *Eagle River Adjudication*:

"The Colorado River Water Conservation District appeared on behalf of and in support of the action of the respondent court denying the motion of the United States to dismiss. Other respondents below were parties in the adjudication proceeding. The City and County of Denver is the largest single user of water in the State and a substantial part of its water supply will come from the Eagle River system. The Central Colorado Water Conservancy District is a claimant of water in that area and New Jersey Zinc Company is also an owner, user and claimant of water in the area. All are affected by the rights the United States indicates it would claim."²⁸⁴

There is no assertion there of a conflict between the National Government and any of the Respondents. It is, indeed, denied that there is a conflict or a justiciable

²⁸⁴APPENDIX, Page 25, footnote 5.

issue before the Supreme Court, if the true facts were fully disclosed.

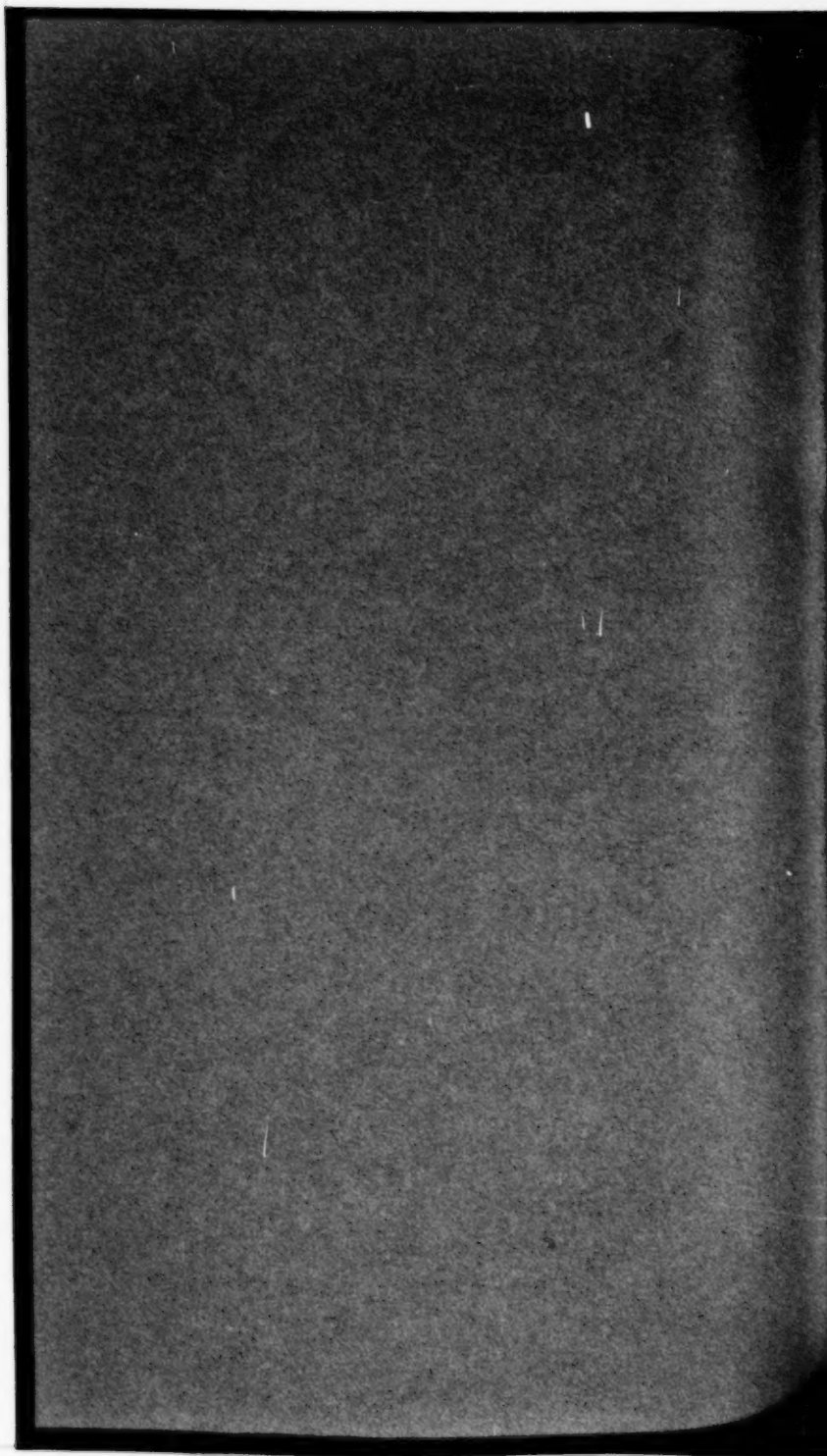
(2) *The United States is not a necessary party*

As reviewed above, the United States, based on the record, is not a necessary party to the *Adjudications*—43 U.S.C. 666 explicitly requires that, prior to joinder, the United States must be a necessary party.²⁸⁵ Inquiry in that connection must be raised as to the nature of the claim of the Colorado River Water Conservation District. What are its powers? What are its claims? Are they adverse to the United States? Similarly, there appears to be no basis whatever for a claim on behalf of the Respondent Central Colorado Water Conservancy District. Again, from the record, there is no basis for determining what that claim may be. That conclusion is manifest from the immediately preceding excerpt from Respondent's *Eagle River Adjudication* brief. As emphasized, only one of the Respondents filed a brief in *Water Division No. 5 Adjudication*. These inquiries must be responded to for there probably have never been more important issues before the Supreme Court in regard to Western water rights. Absent proof from the record that the United States is a necessary party, demand must be made for dismissal of the proceedings.

/s/ William H. Veeder
William H. Veeder
Water Conservation and
Utilization Specialist

March 23, 1971

²⁸⁵See above, page 2.



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APPENDIX

Office Supreme Court U.S.

FILED

Feb 12 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term, ~~1969~~ [Now October Term, 1970] No. ~~1178~~ [Now No. 87]

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

Petition For A Writ of Certiorari To The Supreme Court Of The State Of Colorado

* * * * *

QUESTIONS PRESENTED

1. Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States for adjudication of its reserved water rights not predicated on State law.

2. Whether the congressional consent to suits against the United States "for adjudication of rights to the use of water of a river system" extends to a supplemental adjudication proceeding in one of some 70 water districts in Colorado which encompasses only a tributary of the Colorado River.

STATUTE INVOLVED

43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) provides:

Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs—

Consent is given to join the United States as a defendant in any suit (1) for the adjudication

Appendix Page 2

of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

The United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37 in the Eagle County District Court in Colorado. Water District 37 is one of 70 water districts in Colorado, and encompasses "all lands lying in the state of Colorado irrigated by water taken from the Eagle river and its tributaries" (Colo. Rev. Stat., 148-13-38 (1963)). The Eagle River is a tributary of the Colorado River.

The United States claims two types of water rights in Water District 37: *appropriative* rights acquired pursuant to State law, and *reserved* rights based on federal law, resulting principally from withdrawals of land

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from the public domain. Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601. Most of the reserved rights claimed by the United States in Water District 37 are for the White River National Forest, which was withdrawn from the public domain by Presidential Proclamation on August 25, 1905 (34 Stat. 3144).

In response to its joinder as a defendant in the State court proceeding,² the United States moved for dismissal as to it, on the ground of lack of jurisdiction. When that motion was denied by the district court, the United States applied to the Colorado Supreme Court for a writ of prohibition. The first ground of that application was that 43 U.S.C. 666 consents only to a suit wherein the rights of all water users within a river system are before the court, and that a supplemental adjudication proceeding in Water District 37 is not such a suit because Water District 37 does not embrace an entire river system. Moreover, the United States contended that, since the jurisdiction of Colorado district courts is limited by State law to the adjudication of water rights arising under Colorado law (appropriative rights), the district court could not adjudicate water rights of the United States based on reservations of the public domain (App. 22).³

The Colorado Supreme Court in an *en banc* opinion concluded that the United States was subject to the

²This footnote omitted here.

³This footnote omitted here.

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jurisdiction of the district court, and accordingly discharged its rule to show cause. The grounds for its decision were that (1) the adjudication proceeding in Water District 37 is an "adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. 666; (2) the United States has consented, by Section 666, to adjudication of its reserved rights; and (3) the Colorado district courts have plenary jurisdiction, independent of State statute, to adjudicate rights of the United States based both on appropriations under State law and on withdrawals from the public domain, and to bring all parties necessary to such an adjudication before the Court (App. 31, 33, 45). The court reserved decision on whether the United States was bound by prior adjudications in Water District 37 to which it was not a party (App. 40).

While the court did not expressly decide that the United States has no reserved water rights in Colorado,⁴ the thrust of its opinion is that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights (*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435) were not determinative (App. 37-40). It suggested that a decision that the United States has reserved rights in Colorado would require the overruling of *Stockman v. Leddy*, 55 Colo. 24, where it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of

⁴This footnote omitted here.

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streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,⁵ had lost any right to assert thereafter water rights in Colorado except those acquired by appropriation pursuant to State law (App. 40).

* * * * *

REASONS FOR GRANTING THE WRIT

The decision below poses substantial hazards to the effective utilization of federal lands in the West. The net effect of that decision may well be to deprive the United States of valuable water rights for use in connection with the development of the public domain. The United States owns approximately 731,000,000 acres of land in the 17 contiguous western States and Alaska. U. S. Dept. of Interior, *Public Land Statistics*, p. 11 (1966). Water is obviously essential to the utilization and administration of land in these arid and semi-arid States, as well as to a variety of other government projects and programs. In this regard, the United States depends both on water rights acquired pursuant to State law and on reserved rights based on withdrawals from the public domain. Until now the validity of the latter source has scarcely been open to question. See, e.g., *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601.

The decision below threatens the inviolability of the federal government's reserved water rights. Courts in other western States may well be guided by the example set in this regard by the Colorado courts. If, as the decision below portends, the rights of the United States to use the water on its public lands which have been

⁵This footnote omitted here.

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withdrawn for various purposes are to be subjected to the vagaries of inconsistent State laws, the implications for any public-oriented program of conservation and land development are indeed serious. The magnitude of the problem is indicated by the fact that about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests, national recreation areas, national monuments, etc.⁷ It is not an exaggeration to suggest that the decision below raises serious questions about the nature and scope of the federal government's water rights on all these public lands.

The appropriation system of water law followed by Colorado is prevalent in the western States.⁸ It is fundamental to this system of water law that the rights of users of water from the same source are carefully described as to priorities, amounts and uses in adjudication proceedings. The only statute by which the United States has given its consent to be made a party to such adjudication proceedings is 43 U.S.C. 666. For that reason, the reach of the consent to suit given by the United States in this statute, which has never been definitively construed by this Court on this point, is of great importance. This is particularly so at a time when increasing demands on the Nation's limited water supplies by a rapidly expanding population make it certain that the problems arising under the statute, such as those involved in this litigation, will be recurring ones.

* * * * *

The appropriation system of water law, upon which the laws of the western States are based, is essentially

⁷This footnote omitted here.

⁸This footnote omitted here.

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different from the concept of reserved water rights. Under Colorado law, to "adjudicate" means essentially to fix the amount and priority date of a water right by determining when, and in what quantity, water was diverted and applied to a beneficial use (Colo. Rev. Stat., 148-9-11, 13 (1963)). Such water rights are subject to loss through abandonment, and thus have characteristics that are incompatible with reserved rights, which arise automatically when lands are withdrawn from the public domain, have priority as of the dates of such withdrawals, and apply to future as well as existing uses. The Colorado Supreme Court's suggestion that the Colorado constitution precludes ownership by the United States of reserved rights in Colorado¹¹ is illustrative of the potential difficulties. But, as we have already noted, the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn subject only to water rights vested as of the date of withdrawal, and the suggestion thus conflicts with decisions of this Court. *Arizona v. California*, *supra*, 373 U.S. at 595-601; *Winters v. United States*, *supra*, 207 U.S. 564; see also *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9); *Burley v. United States*, 179 Fed. 1, 12-13 (C.A. 9).¹²

* * * * *

2. Similarly, the court below erred in holding that the United States may be joined under 43 U.S.C. 666 in a State court proceeding for the adjudication of water rights in one of Colorado's 70 water districts. The proceeding relating to Water District 37 is not one

¹¹This footnote omitted here.

¹²This footnote omitted here.

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"for the adjudication of rights to the use of water of a river system or other source" within the meaning of Section 666. The courts have in general required that all parties claiming rights to the use of water of a river system or other source be before the court, and that the suit be one for an *inter sese* determination of all claimed rights. In *Dugan v. Rank*, 372 U.S. 609, 618, this Court spoke of "a *general* adjudication of 'all of the rights of various owners on a given stream.'" And in *Miller v. Jennings*, 243 F.2d 157, 159 (C.A. 5), the court said:

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. * * *¹³

Assuming here that the proceeding in Water District 37 is for an *inter sese* adjudication of all water rights claimed in Water District 37, and that the district court can bring all necessary parties before it, the question remains whether Water District 37 includes a "river system" within the meaning of the statute. We believe it does not. Water District 37 is only one of 70 water districts in Colorado (see note 15, *infra*). And the United States has been joined in similar proceedings in Water Districts 36, 51, and 52 in Colorado,¹⁴ as well as in other States, including Utah, Idaho, New Mexico and Washington. More such suits can be expected to follow if the Colorado Supreme Court's decision is al-

¹³This footnote omitted here.

¹⁴This footnote omitted here.

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lowed to stand. Certainly Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate rights as to only small portions of recognizable river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread. Congress obviously had this in mind when it enacted 43 U.S.C. 666, and that provisions should be construed accordingly.¹⁵

* * * * *

¹⁵This footnote omitted here.

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Office Supreme Court U.S.
FILED May 14, 1970
John F. Davis, Clerk

APPENDIX

Supreme Court of the United States

* * * * *

In the District Court in and for the County of Eagle
and State of Colorado.

* * * * *

The Colorado River Water Conservation District,
Petitioner.

NOTICE OF APPLICATION FOR SUPPLEMENTAL
ADJUDICATION OF WATER RIGHTS

* * * * *

All persons, associations and corporations interested
in the priority of rights to the use of water for bene-
ficial purposes in Water District No. 37.

YOU ARE HEREBY NOTIFIED That the above
named Petitioner has filed a petition, * * *

* * * * *

* * * this notice shall not require any owner or
claimant of a water right which has already been ad-
judicated to submit such water right in this supple-
mental adjudication.

YOU ARE FURTHER NOTIFIED that in said
petition, filed as aforesaid, the petitioner asked for an
adjudication of the following amounts of water as set
opposite each of its claims herein, to-wit:

- (a) The Wolcott Reservoir—65,975 acre feet of
water, including 810 acre feet of dead storage;
- (b) Wolcott Pumping Pipeline—500 cubic feet of
water per second of time;

all dating back to April 27, 1966 for municipal, indus-
trial, domestic, irrigation, stock watering, electric power

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generation, recreational and other beneficial uses and purposes.

(c) Nolan Creek Feeder Canal—38.5 cubic feet of water per second of time.

(d) Hat Creek Feeder Canal—27.0 cubic feet of water per second of time.

all dating back to June 10, 1966 for irrigation, domestic, municipal, industrial and other beneficial uses and purposes;

* * * * *

WITNESS my hand and the seal of said Court this 3rd day of October, 1967.

* * * * *

In the Matter of the Adjudication of Priority Rights to the Use of Water for Irrigation and Other Beneficial Purposes in Water District No. 37 in the State of Colorado, The Colorado River Water Conservation District, Petitioner.

**MOTION TO DISMISS THE UNITED STATES
FOR LACK OF JURISDICTION**

The United States moves this Court to dismiss the United States from the above-captioned action for lack of jurisdiction for the reasons set forth in the accompanying Memorandum of Points and Authorities.

* * * * *

**MEMORANDUM OF POINTS & AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS THE
UNITED STATES FOR LACK OF JURIS-
DICTION**

* * * * *

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V FORMER ADJUDICATIONS & RIGHTS OF THE
UNITED STATES IN WATER DISTRICT NO. 37

The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the purpose of said withdrawal with a priority of August 25, 1905.

In addition to our general reserved right, the United States will claim various specific uses, as follows:

(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

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(c) 10 C.F.S. for the McInturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S. 87° 25' W, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S. 75° 31' W, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time.

* * *

SUPPLEMENT TO MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS THE UNITED STATES FOR
LACK OF JURISDICTION

indicate briefly the nature and date of certain additional rights claimed by the United States, but which were only reported to the Department of Justice in the past two weeks.

* * *

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(3) The United States claims 19 rights to use springs and waterholes on lands managed by the Bureau of Land Management. In regard to these springs the United States claims a reservation date of April 17, 1926, based on an Executive Order issued that date entitled Public Water Reserve No. 107. In addition to the April 17, 1926, reservation date, the United States claims it has priority to use these springs under § 148-2-2, Colo. Rev. Stat. (1963). In the alternative, the United States will claim priorities at least as early as the early 1940's for most of the springs.

(4) The United States claims rights for approximately 75 additional uses on lands managed by the Bureau of Land Management for livestock, wildlife and recreation. These uses fall into two principal categories: (a) small reservoirs or retention dams; and (b) small diversions from both perennial and intermittent streams. The United States claims priorities in the 1940's, 1950's and 1960's for the reservoirs and retention dams. Information concerning the priorities for the diversions has not yet been supplied to the Department of Justice. In addition, the United States may claim a reservation date for some of these rights.

* * * * *

No.

In the Supreme Court of the State of Colorado

The United States of America v. The District Court
in and for the County of Eagle and State of Colorado
and the Judge Thereof, the Honorable William H. Luby.

APPLICATION FOR WRIT IN THE
NATURE OF PROHIBITION

COMES NOW the United States of America * * *
and PRAYS that an alternative Writ in the Nature
of Prohibition issue out of this Court to the District
Court in and for the County of Eagle and State of
Colorado and to the Judge thereof, the Honorable Wil-
liam H. Luby, prohibiting said court and Judge from
asserting jurisdiction over the United States, from ad-
judicating any water rights of the United States or from
purporting to bind the United States in Civil Action
No. 1529, captioned IN THE MATTER OF THE
ADJUDICATION OF PRIORITY RIGHTS TO THE
USE OF WATER FOR BENEFICIAL PURPOSES
IN WATER DISTRICT NO. 37 IN THE STATE OF
COLORADO (a supplemental adjudication in Water
District No. 37 under section 148-9-7, Colo. Rev. Stat.
(1963)), for the reason that said court and Judge
are wholly without jurisdiction over the United States.
The grounds for this application and the circumstances
out of which it arose are as follows:

(1) On November 2, 1967, the Attorney General
of the United States received by registered mail a copy
of NOTICE OF APPLICATION FOR SUPPLE-
MENTAL ADJUDICATION OF WATER RIGHTS
for Civil No. 1529, * * *

* * * * *

(11) At said hearing on August 20, said Judge ruled
from the bench that the motion of the United States
to dismiss be denied and the motion of Denver for
supplemental notice be denied. Said Judge has set Oc-
tober 21, 1968, as the last date for filing statements of
claim and October 28 as the date for taking evidence
in said matter.

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(12) The question of jurisdiction of the United States in 1529 is one of great importance. The United States is the owner of many water rights in the State of Colorado. By and large these rights have not been adjudicated under Colorado adjudication procedures (148-9-1 et seq., C.R.S. (1963)). The United States, however, has recently been served in three additional supplemental adjudications:

- (1) W.D. 36, Dist. Ct., Summit Co., Civil No. 2371;
- (2) W.D. 51, Dist. Ct., Grand Co., Civil No. 1768; and
- (3) W.D. 52, Dist. Ct., Eagle Co., Civil No. 1548.

The United States has filed motions to be dismissed from each of these adjudications, which motions are still pending. In addition, the United States has been informally advised by members of the Bar of Colorado that it may expect to be served in many more supplemental adjudications throughout Colorado. Thus it is clear that many citizens of the State of Colorado are attempting to bind the United States to proceedings to which it was not a party and to cut off and destroy the rights of the United States by the means of having the courts of Colorado assert purported jurisdiction over the United States in supplemental adjudications. This creates the need for a clear opinion from this tribunal upholding the immunity of the United States from suit.

It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date

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of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances.

WHEREFORE, the Petitioner, the United States of America prays this Honorable Court:

1. To take original jurisdiction in the matters thus presented to it;
2. To issue an order commanding the respondent court and Judge to show cause why they, and each of them, should not be prohibited from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529;
3. To issue an order prohibiting the respondents, said court and Judge, from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529.

* * * * *

October 14, 1968

* * * * *

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No. 23819

The United States of America, Petitioner v. the District Court in and for the County of Eagle and State of Colorado and the Judge Thereof, the Honorable Harold A. Grant, Respondents. The Colorado River Water Conservation District, City and County of Denver, Acting by and Through the Board of Water Commissioners, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenor.

ORIGINAL PROCEEDING

EN BANC

RULE DISCHARGED

[Colo.; 458 P.2d 760]

* * * * *

MR. JUSTICE GROVES delivered the opinion of the Court

This is an original proceeding in this court wherein the United States has asked for a writ prohibiting the district court from asserting jurisdiction over it in a supplemental water adjudication under C.R.S. 1963, 148-9-7. We issued a rule to show cause why the relief requested should not be granted.

The proceeding is in Water District 37 of the State of Colorado, which embraces the Eagle River and its tributaries. The Eagle River is a tributary of the Colorado River and is non-navigable. There have been a number of previous adjudications in this water district. The decree in the original adjudication was entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings.

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The current proceedings were commenced by the Colorado River Water Conservancy District and it sought to make the United States a party under 43 U.S.C. §666 (known as the McCarran Amendment) [see *supra* this APPENDIX Pages 1 and 2] [458 P.2d 761-762]

* * * * *

The United States moved the district court for dismissal as to it by reason of lack of jurisdiction. This motion was denied by the Honorable William H. Luby, the judge of the court, who has since retired. We have concluded that the district court has jurisdiction over the United States in these proceedings and that the motion was properly denied.

The propositions asserted by the United States are based upon the solid foundation that: (1) the United States cannot be subjected to the jurisdiction of any court without the consent of Congress; and (2) the only statute adopted by the Congress consenting that the United States may be made a party to a water adjudication is the McCarran Amendment. * * * The Government's propositions are as follows:

(1) The McCarran Amendment can be used only with respect to a general adjudication of a river system in which all rights of all users are before the court; and the present proceeding does not involve (a) a general adjudication, (b) an entire river system, nor (c) all water users in the district.

(2) The United States has unadjudicated rights antedating the last adjudicative decree and the district court cannot give priorities to these rights prior to the date of the last adjudication.

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(3) The district court has jurisdiction only to adjudicate rights arising out of Colorado law and the United States claims rights arising otherwise.
[458 P.2d 762]

* * * * *

IV

APPROACH TO THE ADJUDICATION OF WATER
RIGHTS OF THE UNITED STATES

[458 P.2d 767]

The remainder of the propositions asserted by the Government (as outlined early in this opinion) might be characterized as follows:

If the state court in Colorado has jurisdiction over the United States, how and why can it grant the relief the United States would desire with respect to its water rights? In oral argument counsel for the Government indicated if there were a satisfactory answer to that question, the United States might not be so loathe to submit itself to the jurisdiction of our state courts. He also gave the distinct impression that he would be most surprised if we produced a ruling which would overcome the trepidation of the Justice Department to see federal water rights under the state jurisdiction. Whether or not we mitigate the sovereign reluctance, we hold that under its plenary power a Colorado district court can make the relative rights of the United States a subject of its decree and can bring under its jurisdiction additional necessary parties in order to make such a decree fully valid, effective and enforceable. Before elaborating on this declaration, we deem it advisable to discuss some of the features and problems involved—or perhaps to be involved—in any dec-

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retory approach to the water rights of the United States in Colorado, which must be confronted someday whether in our state courts or in a federal forum.

In the district court the United States filed a memorandum supporting its motion to dismiss. It there made the following statement concerning its claims to the use of water:

[See *supra* this APPENDIX Pages 8 and 9]

* * * * *

V

RESERVED RIGHTS

[458 P.2d 768]

The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially antedating several of the supplementary decrees in Water District 37 under the authority of *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed. 2d 542; *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215; *Winters v. United States*, 207 U.S. 546, 28 S.Ct. 207, 52 L.Ed. 340; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136.

In contrast, counsel or the intervenor Central Colorado Water Conservancy District contend that the United States has no rights whatsoever except any that it might have acquired in the same manner as an individual. In support of this they cite Article XVI, §§ 5 and 6 of the Colorado constitution and *Stockman v.*

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Leddy, 55 Colo. 24, 129 P. 220. These sections were placed in the constitution at the time it was prepared under the enabling act of Congress. Section 5 and a portion of Section 6 read as follows:

“Section 5. Water of streams public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

“Section 6. Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *”

* * * * *

Winters v. United States, *supra*, [458 P.2d 770] involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union “upon an equal footing with the original States” (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado’s admission into the Union.

The *United States v. Rio Grande Dam & Irrig. Co.*, *supra*, involved acts within the Territory of New Mexico prior to the time New Mexico became a state. It was there stated:

* * * * *

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We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. We do say at this time that, except for *Stockman v. Leddy, supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound.

VI

WATER APPROPRIATIONS OF THE UNITED STATES UNDER STATE LAW

[458 P.2d 771]

* * * * *

* * * the Government * * * quotes from *Arizona v. California*, 298 U. S. 558, 56 S. Ct. 848, 80 L.Ed. 1331 that "no decree rendered in its absence can bind or affect the United States * * *."

* * * * *

It well may be that the same principle should be applied to appropriations made by the United States which have not been included in previous adjudications to which the United States was not a party.

VII

JURISDICTION OVER THE WATER CLAIMS
OF THE UNITED STATES

[458 P.2d 771]

We now return to the proposition asserted earlier that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights and relative priorities. For the purpose of our holding in this respect we make the following three assumptions *arguendo*: (1) the United States has reserved water rights in Water District 37 initiated prior to more recent general adjudication decrees in that district; (2) The United States has acquired rights to the use of water under Colorado law and such rights were initiated prior to the decrees just mentioned; and (3) The United States is entitled to a decree that its rights to the use of water are the same as if each of those rights had been awarded priorities in a water adjudication next following the initiation of the right. We repeat—these are assumptions *arguendo*—not determinations.

Water rights in Colorado are of the greatest importance to the welfare and economy of the people of this state, and of considerable importance to the United States. There are about 2,700,000 acres of land under irrigation in Colorado. Of the 66½ million acres of land in Colorado, the United States has 36.4%—or about 24½ million acres—in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.

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We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure—and this is equally true from the standpoint of the United States as well as Colorado and its citizenry. The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction. "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein * * *." Colo. Const. art. VI, § 9(1). We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration.

* * * * *

For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights. Of particular significance was the letter of the Acting Assistant Secre-

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tary of the Interior to the Chairman of the Committee on the Judiciary as to the McCarran Amendment under date of August 3, 1951. This is made a part of the Committee's Report mentioned earlier on pages 7 and 8. Senate Calendar No. 711, *supra*. A portion of the letter reads:

"The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U.S. 564 (1908))

* * *

* * * We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication.

* * * * *

IX

WATER RIGHT DETERMINATION AND
ADMINISTRATION ACT OF 1969

[458 P.2d 774]

Senate Bill 81 adopted in 1969 (C.R.S. 1963, 148-21-1 *et seq.*) was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this matter. We do not make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

Rule discharged.

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Office, Supreme Ct, U.S.

FILED

May 15, 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970]. No. 1178[87].

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari To The Supreme Court Of The State Of Colorado.

BRIEF FOR THE UNITED STATES

* * * * *

QUESTIONS PRESENTED

[See *supra* this APPENDIX, page 1]

* * * * *

STATUTE INVOLVED

[See *supra* this APPENDIX, pages 1 and 2]

* * * * *

[See *supra* this APPENDIX, pages 2 and 3]

STATEMENT

* * * * *

In the course of its opinion the court strongly suggested that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights—*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435—were not determinative. It indicated that a decision that the United States has re-

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served rights in Colorado streams would require the overruling of *Stockman v. Leddy*, 55 Colo. 24. There it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,² lost any right to assert thereafter water rights in Colorado except those acquired by appropriation pursuant to Colorado law (A. 34-35).

SUMMARY OF ARGUMENT

* * * * *

II

That the United States had reserved water rights based on withdrawals from the public domain is well established. *Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564. The withdrawal, in 1905, of lands in Colorado for the White River National Forest reserved enough water from sources on those lands to fulfill the purposes for which they were withdrawn. The Colorado Supreme Court's suggestion that the Colorado Constitution, which has been held to assert ownership of all unappropriated waters within the State, precludes ownership by the United States of reserved rights in Colorado based on withdrawals from the public domain subsequent to statehood, is erroneous. Congress did not intend, in passing the enabling act providing for Colorado statehood, to give up any of its rights with respect to the public domain.

* * * * *

²This footnote omitted here.

ARGUMENT

Introduction. An understanding of the issues in this case requires a careful consideration of federal withdrawals of land from the public domain, with particular emphasis on the purposes of such withdrawals.

* * *

* * * about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, military reservations, national parks, national forests, national recreation areas, national munuments, wildlife refuges, etc.³ Most of these withdrawals from the public domain have been made for the express purpose of conserving important segments of that area for the future use and enjoyment of the entire public of the United States, rather than for the particular profit or use of the people who happen to live and work in the immediate area. * * *

The water rights of the United States based on federal law consist primarily of reserved rights. Reserved rights entitle the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, with a priority as of the date of withdrawal, subject only to water rights vested as of that date. *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601. Not only is this a settled principle of law, but indeed a necessary one. For it would be idle to set aside large areas of the public domain for the enjoyment of future generations without providing the assurance of sufficient water for their maintenance.

* * * * *

³This footnote omitted here.

I.

43 U.S.C. 666 Does Not Consent to Adjudications of
the Reserved Water Rights of the United States

The Colorado Supreme Court has held that the United States, through the enactment by Congress in 1952 of 43 U.S.C. 666, has consented to the adjudication of its reserved water rights in State courts (A. 41). That holding is, we submit, erroneous. As indicated previously (*supra*, p. 6), the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601; *Winters v. United States*, 207 U.S. 564; *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-337, 339-340 (C.A. 9). In *Winters*, where the United States asserted this right with respect to an Indian reservation, this Court said (207 U.S. at 577):

[T]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. * * *

This essential idea has been brought up to date and correlated with the realities of modern public land management in *Arizona v. California*, 373 U.S. 546, 598, 601, where this Court stated:

We have no doubt about the power of the United States under these clauses [the Commerce Clause,

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Art. I, Sec. 8, and the Property Clause, Art. IV, Sec. 3, of the Constitution] to reserve water rights for its reservations and its property.

* * * * *

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

* * * * *

II.

The Reserved Rights Doctrine Is Applicable to Lands Withdrawn From the Public Domain in the State of Colorado

While the Colorado Supreme Court has not specifically denied the existence of federal reserved water rights in Colorado or elsewhere in the West, its statements casting doubt on their existence underline our concern that State courts and State law together would, in fact, eliminate such rights. For this reason, we urge this Court specifically to reaffirm the principle that the United States has reserved water rights in the western States, including Colorado and other States with similar constitutional provisions. [See APPENDIX, Pages 14-15]

* * * * *

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The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution which the Colorado Supreme Court, in *Stockman v. Leddy*, 55 Colo. 24, construed as an assertion of ownership of all unappropriated waters within its borders, does not preclude ownership by the United States of reserved water rights in Colorado. *Arizona v. California*, 373 U.S. 546, 597-598. By passing the enabling act providing for Colorado statehood,¹² Congress intended only to authorize statehood, not to give up any of its property rights with respect to the public domain. This is made clear by Section 4 of the enabling statute, which provides:

[T]he people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States * * *.

* * * * *

The supplemental adjudication proceeding in Water District 37 does not meet the foregoing requirements of a general adjudication, and the court below accordingly erred in holding that the United States was properly joined. The United States does not contend that the cases construing 43 U.S.C. 666 are necessarily dispositive of the question whether Water District 37, which embraces the watershed of one tributary of the Colorado River, comprises a "river system" within the mean-

¹²This footnote omitted here.

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ing of the statute. But it seems apparent from the legislative history that Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate only fragments of recognizable river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread. Where a river system can be said to be wholly contained within one State, the proceeding should at least relate to the entire system and include all parties asserting rights to the water thereof. And where a river system traverses the boundaries of a single State, the United States should not, we submit, be required to assert its rights in any proceeding that is less than statewide in character.

* * * * *

May, 1970

Supreme Court, U.S.

FILED

JUL 15 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1970, No. 87.

United States, *Petitioner* v. The District Court in and for the County of Eagle and State of Colorado *** *Respondents*. The Colorado River Water Conservation District, City and County of Denver * * * Central Colorado Water Conservancy District, and the New Jersey Zinc Company, *Intervenors*.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF FOR RESPONDENTS
AND INTERVENORS

* * * * *

STATEMENT

In October 1967, upon the petition of the Colorado River Water Conservation District,¹ the District Court for Eagle County, Colorado issued a Notice of Application for Supplemental Adjudication of Water Rights (A. 3-4) covering the Eagle River and its tributaries,² an intrastate river system³ tributary to the Colorado River. * * *

* * * * *

¹This footnote omitted here.

²This footnote omitted here.

³The Eagle River is a substantial tributary of the Colorado River in Colorado. The mainstream is about 65 miles in length, and of numerous tributaries, some 17 totalling an additional 180 miles may be considered major water producers. The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions.

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When the respondent court denied the motion to dismiss and calendared the case, instead of actually filing the claims its memorandum referred to so that they could be known and evaluated, the Government applied to the Supreme Court of Colorado for a writ of prohibition (A. 10-15), at the same time advising that court (A. 14):

It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriate rights, most of the objections of the United States to these adjudications would be removed. (emphasis added)

The Supreme Court of Colorado issued a rule to show cause to the court below (A. 16), answer was made (A. 17-18), and the Colorado Supreme Court reviewed the case on briefs and oral arguments.⁵

* * *

* * * * *

⁵The Colorado River Water Conservation District appeared on behalf of and in support of the action of the respondent court denying the motion of the United States to dismiss. Other respondents below were parties in the adjudication proceeding. The City and County of Denver is the largest single user of water in the State and a substantial part of its water supply will come from the Eagle River system. The Central Colorado Water Conservancy District is a claimant of water in that area and New Jersey Zinc Company is also an owner, user and claimant of water in the area. All are affected by the rights the United States indicates it would claim.

SUMMARY OF ARGUMENT

* * * * *

II

The issue on which the Government sought certiorari in this Court was whether the respondent court had jurisdiction to entertain the Government's claims. The respondent court supported that effort in order to put the jurisdictional issue to rest and this Court accepted the case on that basis. Now the Government in effect seeks a declaratory order "reaffirm[ing] the principle that the United States has reserved water rights" while at the same time asking this Court to dismiss it from any adjudication. The reason to reaffirm reserved rights, we are told, is that the court below made statements "casting doubt on their existence [thus underlining] our concern that State courts and State law together would . . . eliminate such rights." *If* the court below does in fact do that, then is the time for informed review of the question. But the court below has not done so and thus the question is not here. Even if it were, the many unresolved questions concerning reservations and whatever water rights may attach thereto make it clear that this Court should await a factual determination below before proceeding further, assuming any further action at that time is necessary. This Court has not heretofore made a blanket reaffirmance of the reservation principle and should not now. It has only been enunciated in the past when the facts before the Court justified its implication.

III.

As noted, in seeking prohibition the United States told the Supreme Court of Colorado that if it:

were to hold that the United States could adjudicate all of its rights in proceedings such as this

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and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed." (A. 14)

* * * * *

II.

Upon The Resolution Of The Question Of Jurisdiction, Which Is All That Was Decided In Both Courts Below, Many Unresolved Issues Remain For Trial And Determination Before Claims Under The Reservation Doctrine Will Be Ripe For Review In An Appellate Court Or Before It May Properly Be Asserted That State Proceedings "Eliminate" (Brief 20) Such Rights.

The Government's request that this Court "reaffirm the principle [of] reserved water rights" (Brief 20) prior to a presentation of specific claims is premature, unnecessary to a decision of this cause, and presents a question not before the Court on certiorari.

* * * The Supreme Court of Colorado did in fact state (A. 37):

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn.

* * * * *

The Government plainly misconstrues the court below in charging that the cases cited by the United

States in support of its claimed reserved rights—*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435—were held as not “determinative” as a consequence of the Colorado Constitution and *Stockman v. Leddy*, 55 Colo. 24 (Brief 4-5). * * *

The United States should go back to that court for a determination of all of its claims before it comes here expressing concern that “State courts and State law together would, in fact, eliminate such rights” (Brief 20). At least one reason for the need for such a determination is that most and possibly all reserved rights claimed to exist must be implied if they are to be found at all, and then quantified to bring certainty in water use. This Court found in *Arizona v. California*, 373 U.S. 546, that the reserved rights claimed for Indian Reservations had to be implied (at 599), as had been the case in *Winters v. United States*. The Special Master in *Arizona v. California* had found “. . . the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation”.⁵⁰ He thus took a great amount of evidence concerning these Reservations, including their population, economy, acreage and water requirements and then quantified the water rights for five Reservations on the mainstream of the Colorado River, rejecting the possibility of an open-end decree,⁵¹ in order to “establish water rights to fixed magnitude and priority so as to provide certainty for both the

⁵⁰This footnote omitted here.

⁵¹This footnote omitted here.

United States and non-Indian users." This Court specifically approved the Master's findings that a reservation of water had been intended for each of the five Indian Reservations involved, agreed with his conclusion as to the quantity of water intended to be reserved, and found the various irrigable acreages included by the Master in reaching quantities of water to be reasonable.⁵² This specificity in treating with conflicting claims in this vital area of water rights is in our view the great contribution of the adjudicatory process, and was what Congress intended in consenting to the joinder of the United States in State proceedings for the consideration of all claims.⁵³

The necessity for doing away with the uncertainty engendered by the implied reservation doctrine is strongly urged in the recent Public Land Law Review Commission Report.⁵⁴ That Report also details problems arising out of the reservation concept, most if not all of which require some evidentiary proceeding before a de-

⁵²This footnote omitted here.

⁵³This Court in *Arizona v. California* approved the fact that the Master declined to adjudicate claims by the United States for other Indian Reservations and federal establishments, particularly those relating to tributaries (*Id.* 595). The Master found it inappropriate to adjudicate matters of intrastate rights and priorities on the tributaries (Master's Report 332-334) and this Court noted that under § 18 of the Project Act "regulation of the use of tributary water" was left to the states (*Id.* 588). The Master did adjudicate conflicting claims of the States and of the Government on the Gila River because this was an interstate tributary on which the controversy was immediate and requiring of decision. But even here he declined to approve a claim on behalf of an Indian Reservation located in Arizona against (1) users of water in New Mexico because the evidence showed it to be impractical, as well as against (2) users of water in Arizona because this was a matter of "intrastate rights and priorities". (Report 333-334). These few references show the desirability of an adjudication and a record before reaching conclusions as to the extent of any claims to the use of water.

⁵⁴This footnote omitted here.

termination could be made.⁵⁵ These unresolved issues in connection with reservations provide additional reasons why we urge this Court to decline the Government's invitation to generalize now on the reservation principle.

To dispose of the uncertainty and other problems in the reservation doctrine the Commission suggests legislation to:

1. Provide a reasonable time for Federal agencies to give public notice of water needs for reserved areas and forbid assertion of reserved claims not so published.
2. Establish procedures for administrative or judicial determination of the reasonableness of the quantity claimed, or validity of the proposed use under present law.
3. Provide that express reservations of water be made in connection with any future reservations of land, and
4. Require that compensation be paid where application of the implied reservation doctrine interferes with uses vested prior to the *Arizona v. California* decision in 1963.

* * * * *

III.

* * * * *

Nevertheless the Government says that "even if an entire river system is in fact involved"⁵² we do not have a general adjudication because the necessary parties were not before the court at the time of the attempted joinder. The Colorado Supreme Court found no

⁵⁵This footnote omitted here.

⁵²This footnote omitted here.

difficulty in holding this to be a general adjudication within the meaning of *Dugan v. Rank*, 372 U.S. 609, 618, because proceedings such as involved in this case met the tests therein prescribed, *i.e.*, this is a public, not a private suit; all claimants are parties; relief is granted as between claimants; and priorities are established. Under Colorado law the adjudication proceedings are "general" whether an original action within a water district or one supplementary thereto. Such actions are in the nature of *in rem* proceedings, and, in the instant case, all statutory notice requirements were complied with.⁶³ Upon such compliance the court acquired jurisdiction of all persons using or claiming the right to use waters of the Eagle River and its tributaries.

The Government now urges that since it would, if otherwise properly a party, claim rights antedating in priority the rights of others already in decree, the owners of those rights are necessary parties before the United States can properly be joined. The Government asserts this despite the fact it has not actually filed such claims, without which the need for and the identity of such parties cannot be determined. Furthermore, this assertion is made despite the fact the court below said appropriate notice could be given upon the filing of such claims.⁶⁴ Additional parties are necessitated, if at all, not by joinder of the United States but by the claim or claims it makes.

* * * * *

July 15, 1970

⁶³This footnote omitted here.

⁶⁴This footnote omitted here.

Supreme Court, U.S.

FILED

Jul 16 1970

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In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ Of Certiorari To The Supreme Court Of The State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATES OF COLORADO, OREGON, NEVADA, IDAHO, MONTANA AND ALASKA IN SUPPORT OF THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

* * * * *

STATEMENT OF INTEREST

* * * * *

Various federal agencies have claimed that the reservation of land for various purposes also reserved sufficient water necessary to effectuate the purpose of the Reservation. The acceptance of such a theory of claims by the federal agencies would, on a fully utilized stream, create a situation wherein increased federal uses would deny water to users who had water rights with priorities established after the Reservation, but prior to the expanded use.

* * * * *

The States do not wish to deprive the Federal Government of valuable water rights. They know only too well that related land resources are much less valuable without the water necessary for their development. The

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States ask only an identification of the extent of the federal rights, so that existing uses might be protected and future developers, whether Federal, state or private, might better be able to predict the water supply available for further development.

QUESTION PRESENTED

Whether the United States, by reliance upon the anachronistic defense of sovereign immunity, should be allowed to avoid the identification of its claims to the use of water from reserved lands needed for the protection of existing rights and the establishment of the stability necessary for meaningful future planning of water resource development.

* * * * *

[Page 21 of brief]

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of the *United States v. Winters* (207 U.S. 546 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under [a series of specified acts]; those with respect to which its officers and employees have followed the procedure prescribed in Section

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8 of the Act of June 17, 1902 (32 Statutes 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation by private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all of these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

* * * * *

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be affirmed. [Though the decision is not cited in the Amicus Curiae brief, see 458 P.2d 760]

[Submitted by Attorneys General, State of Colorado, State of Oregon, State of Nevada, State of Idaho, State of Montana, State of Alaska]

Supreme Court. U.S.

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JUL 15 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF FOR THE STATE OF ARIZONA AND
THE ARIZONA INTERSTATE STREAM
COMMISSION AS AMICI CURIAE

* * * * *

ARGUMENT

I.

The basic dilemma which the McCarran Amendment² was intended to resolve is well-known. In the usual case the water rights of any individual claimant cannot be determined in isolation from the rights of other claimants along the same stream or other water source. A judicial determination that any one individual is entitled to a water right in a given source is of small significance, even to the claimant, unless there has also been a determination concerning the validity of other claims to the same source, including relative priorities, and quantities to which each claimant is entitled. As the Ninth Circuit Court of Appeals has observed:

"The only proper method of adjudicating the rights on a stream, whether riparian or appropria-

²This footnote omitted here.

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tive or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time." *People of the State of California v. United States*, 235 F.2d 647, 663 (9th Cir. 1956).

* * * * *

The Ninth Circuit Court of Appeals stated the purpose of the McCarran Amendment as follows:

"There can be little doubt as to the kind of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters on the stream system; rather, it was the quasi-public proceeding in which the law of western waters is known as a 'general adjudication' of the stream system: one in which the rights of all claimants on the stream system, as between themselves, are ascertained and officially stated." *State v. Rank*, 293 F.2d 340, 347 (9th Cir. 1961).

* * * * *

* * * The significance of the statutory reference to both "river system" and also "other source" is illustrated by a situation in Arizona which is typical of the situation in other western states. The Verde River and Tonto Creek are both tributaries of the Salt River, which in turn, is a tributary of the Gila River, which, in turn, is a tributary of the Colorado River in its lower reaches. The headwaters of Tonto Creek are some 80 miles from the headwaters of the Verde River and these two are separated at all points by two large mountain ranges. The confluence of Tonto Creek and the Salt River is some 50 miles East of the confluence of the Salt and Verde Rivers. Physically it would be impossible for a user on the Verde River to interfere with a user on Tonto Creek. Of course, if an adjudication in-

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volved the rights to the use of water from the Salt River below the confluence of the Verde, then the adjudication would be broadened; perhaps such an adjudication is what was anticipated by the words "river system." However, the rights of the appropriators or users on the Verde River obviously could be adjudicated without joining the users on the Tonto.⁵ * * *

* * * A person who owns land along the Verde River and uses water of the Verde River is simply not affected by the claims of other persons along the Tonto, the Gila, or other tributaries or subtributaries of the Colorado, unless by coincidence the same person also happens to own other land on which he uses the waters of those rivers.

* * * As the Ninth Circuit Court of Appeals stated in *State of Nevada v. United States*, 279 F.2d 699, 701 (9th Cir. 1960):

"The suit to which the section [666] refers is one to establish the relative rights of users of the waters of a stream or other common source: one to settle disputes between such water users with respect to their rights among themselves."

* * * * *

Whatever the scope of sovereign immunity generally, in water rights litigation involving an entire river system or other source, sovereign immunity has been waived by the Congress of the United States. What Congress has done should not now be undone by this Court.

* * * * *

Attorney General of the State
of Arizona

* * * * *

Special Counsel, Arizona
Interstate Stream Commission

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Supreme Court, U.S.

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E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATE
OF UTAH

* * * * *

[For consequences of attempted piecemeal adjudication by the Justice Department and the attendant abridgment and loss of invaluable rights to the use of water by the United States of America, see *In re Green River Adjudication v. United States of America*, Appellant, 17 Utah 2d 50, 440 P.2d 251, particularly 252]

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Office, Supreme Court, U.S.

FILED

JUN 13 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 1178 [87].

United States, Petitioner, vs. The District Court in and for the County of Eagle and State of Colorado, Respondent.

Brief of the State of California as Amicus Curiae
in Support of the District Court in and for the
County of Eagle and State of Colorado

* * * * *

Summary of Argument

* * * * *

Amicus contends that the McCarran Amendment waives immunity in an adjudication of water rights' claims *inter sese* within any determinable unit, whether that unit be the whole or a portion of a river system. Amicus further asserts that since an adjudication exclusive of "reserved rights" would render such litigation and the McCarran Amendment utterly valueless, reserved rights are clearly within the scope of rights intended to be determined under the McCarran immunity waiver.

ARGUMENT

* * * * *

* * * In *Miller v. Jennings*, 243 F.2d 157, 159, the court indicated that a general adjudication could result among those only on the Upper Rio Grande. [Contrary to express ruling—the suit was brought in Texas] In *Arizona v. California*, 373 U. S. 546, this

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court entertained essentially a general adjudication of the Lower Colorado River Basin. Thus there can be no doubt of the efficacy of adjudicating that portion of a stream requiring such a supply and demand determination without adjudicating the whole. [Contrary to express ruling: That case involved a Congressional allocation among the Lower Basin States, see 373 U.S. 546, 565 et seq.]

* * * * *

Dated: June 12, 1970.

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Attorney General,

* * * * *

State of California.

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Office-Supreme Court, U.S.

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In the Supreme Court of the United States, October Term 1969 [1970] No. 1178 [87].

United States Petitioner versus The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATE
OF OKLAHOMA

* * * * *

June 15, 1970

* * * * *

INTEREST OF AMICUS CURIAE

The State of Oklahoma is essentially an appropriation state with respect to water adjudication, 87 O.S. Supp. 1969, § I-A. In determining water rights within its borders the State is faced with the problem that the United States asserts certain water rights based upon the doctrine of reserved rights. Such being the case, all determinations of water rights made concerning river systems in which the United States claims reserved rights, are subject to such reserved rights. This leads to confusion and uncertainty as concerns the water rights in such river systems. Therefore, it is believed that there should be some method through which the state can force the United States into some forum

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in order to determine the extent of the rights the United States has in such river system. The State of Oklahoma therefore has an interest in the question of whether or not 43 U.S.C. § 666 consents to suit against the United States in situations where the United States claims water rights under the doctrine of reserved rights.

* * * * *

Attorney General

* * * * *

* * * State of Oklahoma

Supreme Court, U.S.

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E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Colorado

AMICUS CURIAE BRIEF FOR THE STATE
OF WASHINGTON

* * * * *

[Contrary to the position of the Justice Department, the State of Washington very correctly views the adjudications as involving Indian rights and, indeed, sets out a verbatim opinion which, among other things, declares:]

* * * It would appear the United States may own land in the water shed and it is trustee for an Indian ward allottee having lands within the water shed
* * *.

* * * * *

[Brief dated July 1970—by * * * Attorney General
* * * State of Washington]

Supreme Court, U.S.

FILED

JUL 14 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATE
OF WYOMING

* * * * *

[Contrary to Justice Department position that Indian rights to the use of water are not involved, what are referred to as the principles of the Winters Doctrine are reviewed in detail in the Wyoming Amicus Curiae brief.

See citation of cases which set forth numerous references to the Winters Doctrine predicated upon Indian rights to the use of water held in trust by the United States, as proving properties owned by the Indians.]
July 1970

* * * * *

Wyoming Attorney General

* * * * *

September 25, 1970

STATEMENT IN SUPPORT OF S. 4165 "TO PROVIDE FOR THE CREATION OF THE INDIAN TRUST COUNSEL AUTHORITY, AND FOR OTHER PURPOSES"

CONFLICTS OF INTEREST WITHIN THE FEDERAL GOVERNMENT THREATEN AMERICAN INDIANS THROUGHOUT WESTERN UNITED STATES

William H. Veeder

* * * * *

Gravest crisis confronting the American Indians in Western United States in general and in the Colorado River Basin in particular is the *Eagle River Adjudication* now pending before the Supreme Court.³ Briefly the important facts and issues of the *Eagle River Adjudication* as it relates to the Indians are these:

1. Seventy percent (70%) of all of the water in the Colorado River rises in the State of Colorado. Eagle River is a principal tributary of the Colorado River within the last mentioned State.

2. The Colorado River is grossly overappropriated largely due to projects built either by Federal agencies or in conjunction with the States within the Colorado River drainage system or subdivisions of those States.

3. Gross overappropriation by the Federal Government is but one aspect of the crisis facing the American Indians in the Colorado River Basin. Pollution of that stream is an ever-increasing and immediate threat particularly to the mainstream Reservations—Fort Mojave, Chemehuevi, Colorado River Indian Reservation, Cocopah and Fort Yuma. That pollution of the stream is due to man-made depletions—reservoir evaporation losses; diversions, both in-basin and transmountain, by the

³United States * * * v. The District Court in * * * County of Eagle and State of Colorado and the Judge thereof * * *.

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Federal Government or cooperating agencies; and evapotranspiration.

4. Any relinquishment by the Federal Government of rights to the use of water in the Eagle River or other tributaries of the Colorado River, or the failure fully to assert American Indian rights in those tributaries, and correctly to represent those Indian interests, constitutes a grave threat not only to the main-stream Reservations but Reservations which rely upon the Green River, San Juan, Little Colorado and tributaries of those streams.

5. Loss of Indian rights on any of the tributaries of the Colorado River necessitates that the deficit in water supply thus created be compensated by increased burdens upon the other tributaries, the San Juan River and its tributaries, the Green River and its tributaries, for example.

6. Invaluable rights to the use of water are held by Indians and Indian Tribes throughout the Colorado River Basin, on the mainstream, the tributaries, and tributaries of tributaries, all inter-related, all inter-dependent. These include, but are not limited to, the Reservations of the Navajos, the Southern Utes, the Ute Mountain, the Uintah-Ouray, the Fort Mojaves, Chemehuevis, Hualapais, Colorado River Indian Tribes, the Cocopahs, Fort Yumas, among others.

7. These basic principles respecting the Indian *Winters Doctrine* prior and paramount rights in the Colorado River Basin must be kept in the foreground in this consideration:

(a) Indian *Winters Doctrine* rights to the use of water in the streams which arise upon,

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border or traverse the Indian Reservations are part and parcel of the land itself, having all the dignity of a freehold interest in real property;

(b) Indian rights to the use of water are private interests in real property held in trust for the Indians by the National Government for the benefit of the Indians;

(c) Indian rights, being private interests in real property and held in trust for the benefit of the Indians, are not the property of the United States available for its use as distinguished from the Indian use;

(d) In its status as trustee of the Indian rights to the use of water the National Government must, in protection and preservation of them, exercise the highest degree of care, skill and diligence, as a consequence of which it must, among other things, assert the full measure and extent of those rights throughout the Colorado River Basin.

(e) Indian rights to the use of water in the Colorado River Basin so gravely threatened by the gross overappropriation of that stream—the pollution of it—may thus be characterized:

(i) they entitle the Indians for whom they are held in trust to quantities of water sufficient to meet their present and future water requirements;

(ii) the title to rights to the use of water held in trust by the Nation for them, in whatever source or stream they exist, extends to the very well springs of the stream system which supply the water, including but not limited to the Eagle River in Colorado;

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(iii) the Indian rights to the use of water relate not only to a quantity of water to meet present and future needs, but those rights relate to the maintenance of a quality of water—not polluted water—which can reasonably be utilized by the Indians.

8. Failure by the National Government, Trustee, to assert Indian rights throughout the Colorado River Basin, in the Eagle River or other tributaries, threatens those rights not only as to quantity but likewise quality, which is inextricably interrelated to quantity.

9. *Eagle River Adjudication as conducted before the Supreme Court—a threat not only to Indian rights to the use of water in the Colorado River Basin, but could give rise to a precedent subjecting Indian rights to State courts and laws with disastrous consequences.* A prime issue presented by the Justice Department to the Highest Court for resolution in the *Eagle County Adjudication*:

Did the United States waive its sovereign immunity from suit in regard to its “reserved rights” to use of water when Congress enacted 43 U.S.C. 666?⁴

This query: Does it apply to Indian rights?

Reference at this juncture is made to the Presidential condemnation of the conflict of interest within the Justice Department respecting Indian rights to the use of water. There the President in his July 8, 1970, message, having described that “inherent conflict of interest,” said, among other things, to the Congress: “The

⁴43 U.S.C. 666, Act of July 10, 1952, 66 Stat. 560 * * *.

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* * * Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee."

In keeping with the Presidential condemnation, without in any way advising the Supreme Court that the *Winters Doctrine* Indian rights to the use of water are private in character—totally different from the standpoint of the law from the rights of the Nation itself—the Justice Department in its brief defined in error the "Reserved rights" as follows:

"Reserved rights have been defined by this Court as *the entitlement of the United States to use* as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn,
* * * *Arizona v. California*, 373 U. S. 546, 595-601."⁵ (Emphasis supplied)

Under no circumstances can the American Indians tolerate the Justice Department erroneous assertion to the Supreme Court that the "Reserved rights" as defined in *Arizona v. California* is "the entitlement of the United States to use" water. Yet the Justice Department Petition for Certiorari, its brief and all supporting data, reiterate and reaffirm that error without at any time declaring that the Indian rights do not—could not—come within the erroneous definition of "Reserved rights" presented to the Court.

In the Petition for Certiorari the failure to distinguish the Indian *private* rights from the Nation's public

⁵No. 87 In the Supreme Court of the United States, October Term, 1970, *United States v. The District Court in * * * County of Eagle* * * *.

rights is well demonstrated by this excerpt from it: Having again alluded to the "federal government's reserved water rights"; "the rights of the United States to use the water on its public land"; the Justice Department describes the magnitude of its problem in the *Eagle River Adjudication* by stating: "* * * about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests * * *."⁶ This entirely incorrect endeavor to meld; to categorize the Indian rights with the Federal rights to use water, threaten a catastrophe to the Indians if 43 U.S.C. 666 is held to be applicable to the Federal rights, which as presented by the Justice Department to the Supreme Court, would necessarily embrace those Indian rights. Nevertheless throughout the brief of the Justice Department to the Highest Court, that error is repeated and compounded on numerous occasions.⁷ A striking aspect of the brief is this:

Although never distinguishing Indian rights to the use of water from Federal rights to the use of water, the Justice Department, with possibly a single exception, relies on decisions which relate entirely or predominantly to the Indian private rights held in trust for them by the National Government.

10. *Failure of Justice Department to distinguish Indian private rights held in trust by the United States, from Federal rights held for the public, threatens—*

(a) *To subject Indian rights to the waiver of immunity from suit under 43 U.S.C. 666;*

⁶Petition for Certiorari to the Supreme Court * * * of Colorado, pages 10-11.

⁷* * * Brief for the United States, pages 3-14.

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(b) *To subject Indian rights to State court jurisdiction;*

(c) *To subject Indian rights to State law with all of the attendant irreparable damage to American Indians.*

There have been reviewed in detail the Justice Department Petition for Certiorari and Brief that:

Failed to advise the Supreme Court that Indian private rights to the use of water held in trust for them, are drastically different from Federal rights held for the public at large; are governed by vastly different laws and concepts;

Failed to advise the Court that there are innumerable Treaties in which the Indians retained their invaluable immemorial rights and that those rights were never part of the public domain, nor were they carved from the public domain as the Justice Department repeatedly stated in error;

Failed to advise the Court that the decisions relied upon involved almost entirely Indian rights or were predominantly Indian rights, and did not pertain to Federal "Reserved rights" for national parks, national forests, Bureau of Land Management properties.

Consistent with its failure to distinguish the Indian rights, private in nature, held in trust by the National Government, from federally owned "Reserved rights" for public purposes, the Justice Department likewise failed to inform the Supreme Court that:

The Congressional waiver of sovereign immunity from suit in 43 U.S.C 666 did not include the Indian rights to the use of water in the Colorado River Basin or elsewhere in the United States.

Let these principles be emphasized:

Indian Tribes are osvereigns in their own right—albeit limited—and as sovereigns they are, and their properties are: (a) immune from suit in the absence of express waiver of that immunity, which 43 U.S.C. 666 most assuredly is not; (b) not subject to State court jurisdiction; (c) not subject to State law.

Yet, irrespective of those precepts of Indian law, the Justice Department in its Petition and Brief to the Supreme Court, failed to make reference to them. Hence a decision can reasonably be anticipated to the effect that the "Reserved rights" of the National Government include the Indian private rights held in trust, which is denied; that 43 U.S.C. 666 constitutes a Congressional waiver of the sovereign immunity from suit in regard to the Indian rights, which is likewise denied.

Indian prior and paramount rights are legally and conceptually different from the rights to the use of water acquired under the doctrine of prior appropriation strictly adhered to in Colorado and other like-minded States. As a consequence, to subject the Indian rights to the use of water in the Colorado River or the tributaries to that stream to State courts or laws would be tantamount to a confiscation of those rights and the Indian priorities which are property rights protected under the National and State constitutions. This disaster to the American Indians may very well ensue by reason of the facts and law as presented by the Justice Department to the Supreme Court in the Eagle River Adjudication.

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11. *A proposition has been offered by Justice to the Colorado courts which the American Indians cannot tolerate.*

In the *Eagle River Adjudication* the Justice Department made no reference to the Indian rights in the tributaries of the Colorado River. It asserted only the "Reserved rights" of the Nation for the National Forests and the Bureau of Land Management. That case thus becomes the classic example of the conflicts of interest within the Department of Justice. It ignores completely the fact that Eagle River and other tributaries are the life blood of the American Indians throughout the Colorado River Basin and that the Indians are invaluable rights in those tributaries.

Confronted with adverse rulings in the *Eagle River Adjudication*, holding that 43 U.S.C. 666 awarded jurisdiction to the State courts, this proposition was made to the Supreme Court of Colorado:⁸

"It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no

⁸United States v. The District Court in * * * County of Eagle * * * Appendix, page 14.—No. 87 * * * October Term 1970.

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representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances." (Emphasis supplied)

The proposition must be viewed on this background:

(a) Only Forest Service rights and Bureau of Land Management rights would be presented;

(b) On the western slope of Colorado there are at least eleven other Water Districts involving State adjudications comparable to the *Eagle River Adjudication*, which would benefit from the Justice proposition, indeed that proposition specifically relates to at least three other State court adjudications;⁹

(c) No mention is made of the downstream rights of the Indians the very existence of which is predicated upon the Eagle River and other streams, all as emphasized above.

Should the Justice Department proceed to fulfill its offer to the Colorado Court, the Indians in the Colorado River Basin would suffer irreparable and lasting damage.

Every phase and aspect of the *Eagle River Adjudication* reviewed at some length above, has been thoroughly researched. If this Committee desires a presentation of that research and documentation supporting the conclusions expressed, it will be presented upon request and made a part of this statement.

⁹Note: 1969 changes in the administration of rights to the use of water in the State of Colorado in no way change the basic concepts set forth in this statement.

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Supreme Court, U.S.

FILED

OCT 7 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1970, No. 812.

United States of America, Petitioner v. The District Court in and for Water Division No. 5, State of Colorado, and the Judge Thereof, the Honorable Clifford H. Darrow, and the Water Referee Thereof.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
COLORADO

* * * * *

The Solicitor General, on behalf of the United States, petitions that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Colorado entered in this case on July 9, 1970.

OPINION BELOW

The Colorado Supreme Court did not render any opinion. The opinion and order of the Water Court (App. B, *infra*, pp. 10-13) are not reported.

* * * * *

QUESTIONS PRESENTED

[See *supra* this APPENDIX page 1]

* * * * *

STATUTE INVOLVED

[See *supra* this APPENDIX pages 1 and 2]

* * * * *

STATEMENT

On February 11, 1970, the Attorney General received a notice, pursuant to the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. State., 148-21-1 *et seq.*, directed to "all persons interested in water applications in said water division No. 5," that "the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969" (App. A, *infra*, p. 9). There followed a list of water right applications giving brief descriptions of the water use. The notice concluded with the statement that "[y]ou are further notified that you have until the last day of March, 1970, to file a verified statement of opposition to any such application, if you desire to oppose any such applications." Similar notices have been received listing water right applications filed during each month thereafter. In addition, the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1969.

In response to the December 1969 notice, the United States filed with the Water Court of Water Division 5 a motion to quash service on the grounds, *inter alia*, that the proceedings before the water court did not constitute the type of water rights adjudications with respect to which the United States had consented to be sued under 43 U.S. 666. (sic) The water court denied the government's motion (App. B, *infra*, pp. 10-13). It recognized that the consent issue is presently before this Court in *United States v. The District Court in and for the County of Eagle and the State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, a case arising from an earlier Colorado water rights proceeding involving a portion of the same water rights here

involved. The court was of the view that it was bound by the decision of the Colorado Supreme Court in *Eagle County* unless and until that decision was overturned by this Court (App. B, *infra*, pp. 12-13). Subsequently, the government's request to extend the time within which to file an answer pending the resolution of *Eagle County* was also denied. Finally, the government applied to the Colorado Supreme Court for a writ of prohibition to stay the proceedings, which the latter court denied on July 9, 1970 (App. C, *infra*, p. 14).

In *Eagle County*, the United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37, one of the then 70 water districts in Colorado. Subsequent to the Colorado District court's denial of the government's motion to dismiss that action for lack of jurisdiction, the Colorado Water Right Determination and Administration Act of 1969 was passed abolishing¹ the 70 water districts and replacing them with seven water divisions. Water Division No. 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), which also includes the former Water District 37 involved in the *Eagle County* case.

The water rights of the United States within the expanded area, however, are vastly more numerous than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries

¹This footnote omitted here.

and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservation was made.

As in the former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law, resulting principally from withdrawals of land from the public domain.

REASONS FOR GRANTING THE WRIT

This case raises in a somewhat different factual context the same issues involved in *Eagle County*, No. 87, this Term. The statutory water adjudication procedures underlying the decision below, however, are the ones now prevailing in Colorado and will govern future state proceedings affecting the vast water interests of the United States in that state. Because the new procedures are significantly different from the repealed procedures from which *Eagle County* arose, this case complements *Eagle County* in an important way and should also be reviewed by this Court.

Two issues are presented in *Eagle County*. The first is whether the consent to be sued embodied in 43 U.S.C. 666 extends to suits against the United States for adjudication of its reserved water rights not predicated on state law; the second is whether a supplemental water adjudication proceeding under the old state law is the type of general water rights adjudication suit contemplated by the consent statute. The first issue is as squarely presented in this case as in *Eagle*

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County and needs no elaboration here. See our brief in *Eagle County*, pp. 10-19.

The second issue in *Eagle County* is here presented in the context of the new state procedures. While some of the defects of the old law have been eliminated (*e.g.*, each of the 70 districts under the old law encompassed only a small segment of a river system), the new procedures are, if anything, more burdensome on the government and bear no similarity to a general adjudication which, in one suit, establishes the rights of all parties *inter sese*. *Dugan v. Rank*, 372 U.S. 609; *State v. Rank*, 293 F.2d 340 (C.A.9); *Miller v. Jennings*, 243 F.2d 157 (C.A.5). See legislative history set forth in our *Eagle County* brief at pp. 12-15.

The new statute contemplates monthly proceedings before a water referee on water right applications. These proceedings do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The notice of the proceeding is directed only to those parties who may be "interested" in the water applications. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. The only parties before the referee are those who have taken affirmative action to file for a water right or have determined that they "desire" to file a statement in opposition, and even those who have elected to participate are not accorded a hearing on the numerous factual issues these cases necessarily involve. In addition, the Colorado statute, which makes all surface water rights confirmed under the current procedure junior to those awarded in previous district adjudications, necessarily excludes those previously decreed

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water rights from the consideration of the referee. As a result, the only rights before the referee are those which have arisen since the last water proceeding.

The referee's proceeding is thus extremely limited. It is administrative rather than judicial, and involves only a small part of the water rights and parties in the entire water division. Such a proceeding does not constitute a "general adjudication" as intended by Congress in 43 U.S.C. 666. See *Dugan v. Rank, supra*, and *Miller v. Jennings, supra*. And see the discussion in our *Eagle County* brief, pp. 24-30.

* * * * *

* * *

Solicitor General

* * *

October 1970.

* * * * *

APPENDIX B

In the District Court in and for Water Division No. 5, State of Colorado, Case No. Misc. # 1.

In the Matter of the Application for Water Rights, Changes for Water Rights, Etc., Filed in Said Court for the Months of December 1969, and January, 1970.

ORDER

* * * * *

This matter came on for hearing and argument before the Court on the 9th day of April, 1970, upon the motion of the United States to quash service. Appearances were as noted on the title and venue page of this Order.

At the conclusion of the hearing, the matter was submitted for consideration and ruling by the Court.

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The grounds of the Government's motion are two:

(1) The proceedings based on said applications do not constitute the kind of water rights adjudication suit with respect to which the United States has consented to be sued.

(2) The purported "service" of the resume does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. Sec. 666 [McCarran amendment].

I

The first ground of the motion has been ruled upon adversely to the Government by the Colorado Supreme Court in an original proceeding. See: the United States of America v. District Court of Eagle County (The Colorado River Water Conservation District, City and County of Denver, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Interveners), Colo. (1969), 458 P.2d 760.

Certiorari has been issued by the Supreme Court of the United States to the Colorado Supreme Court in that case for a review of its order discharging the rule to show cause why a writ of prohibition should not be issued to the trial court which had ruled that the United States was amenable to its jurisdiction in a supplemental general water adjudication being conducted under the Water Act which has since been superseded (except as to pending proceedings thereunder), by a new and different law known as the Water Rights Determination and Administration Act of 1969, under which these instant proceedings are pending.

The prohibition proceeding in the Colorado Supreme Court was heard and ruled upon under the earlier water law (C.R.S. 1963, 148-9-7).

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In our opinion, the *ratio decidendi* of the Colorado Supreme Court is equally applicable to proceedings for which provision is made by the 1969 Act as concerns the Government's contention stated in sub-division (1) of the motion to quash. Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5.

* * * * *

III

It might be said that there should be a present suspension of a ruling by this Court upon the motion to quash, inasmuch as the disposition of the original proceeding in the Colorado Supreme Court has been challenged in the highest Court in the land.

We are bound by and must follow, however, the rule of decision as enunciated by the highest Court of this state, while also being bound by the Supremacy Clause of the United States Constitution.¹ When we consider the waiver of immunity created in 43 U.S.C. 666, we do not find in the matter before this Court any conflict with the Supremacy Clause of the Constitution of the United States.

We shall treat the Colorado Water Rights and Determination Act of 1969, as a matter of local concern in which federal sovereign immunity has no place, unless and until the higher Courts of Colorado, or the federal jurisdiction, shall hold otherwise.

For the reasons stated, we must overrule the motion to quash.

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It is so ordered.

The Court will entertain, where appropriate, applications by the United States for reasonable extensions of time.

Done at Chambers in the City of Glenwood Springs, Colorado, this 21st day of April, 1970.

* * * * *

APPENDIX C

In the Supreme Court of the State of Colorado,
24821.

The United States of America v. The District Court
in and for Water Division No. 5, State of Colorado
and the Judge Thereof, the Honorable Clifford H. Dar-
row, and the Water Referee Thereof.

Application for Writ in the Nature of Prohibition

ORIGINAL PROCEEDING

Upon consideration of the application of the
United States of America for writ in the nature of
prohibition, together with the pleadings filed, it is this
day ordered that said application be, and hereby is,
denied.

BY THE COURT, EN BANC, July 9, 1970.

TELEGRAM

* * * OCT 21 504PPDT [1970]

ERWIN N GRISWOLD

OFFICE OF THE SOLICITOR GENERAL OF THE
UNITED STATES

3900 WATSON PLACE WASH DC

THE AGUA CALIENTE BAND OF MISSION INDIANS DOES HEREBY REQUEST IMMEDIATE RIVER ADJUDICATION NOW PENDING BEFORE UNITED STATES SUPREME COURT TAKEN OFF CALENDAR. THIS REQUEST IS PREDICATED UPON THE FACT THAT IRREPUTABLE (sic) HARM AND DEPRIVATION OF LEGAL RIGHTS TO OUR TRIBE AND OTHER INDIAN TRIBES COULD RESULT THEREFROM IN AS MUCH AS AN ADVERSE DECISION COULD GIVE RISE TO A PRECEDENT AND SUBJECT INDIAN RIGHTS TO STATE COURTS AND LAWS IN SUCH A MANNER AS TO OBVIATE THE PRESENT PROTECTIVE FEDERAL LAWS AND REGULATIONS ENACTED FOR THE BENEFIT AND ASSISTANCE OF INDIANS. UNDER 43 USC 666 THERE CAN BE NO WAIVER OF IMMUNITY FROM SUIT RESPECTING INDIAN RIGHTS AND THE FAILURE OF THE JUSTICE DEPT TO DISTINGUISH INDIAN PRIVATE RIGHTS HELD IN TRUST BY THE UNITED STATES IN SAID EAGLE RIVER ADJUCITAION (sic) FROM FEDERAL RIGHTS HELD FOR THE BENEFIT OF

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THE PUBLIC CONSTITUTES A FURTHER
THREAT TO THE PRESENT STATUS OF IN-
DIANS THROUGHOUT THE COUNTRY.

LARRY N OLINGER

CHAIRMAN OF THE AGUA CALI-
ENTE BAND OF MISSION INDIANS
TRIBAL COUNCIL

RAYMOND SIMPSON

SUITE 406 SEC BANK BLDG
110 PINE 90802 [LONG BEACH]

TELEGRAM * * *

OCT 22 PM 9 35 [1970]

ERWIN N GRISWOLD

OFFICE OF SOLICITOR GENERAL OF UNITED
STATES

3900 WATSON PLACE WASH DC

THE FORT MOJAVE TRIBE REQUESTS THAT
YOU OFFICE SEEK TO HAVE EAGLE RIVER
ADJUDICATION NOW PENDING BEFORE THE
UNITED STATES SUPREME COURT TAKEN OFF
CALENDAR. THE INTEREST OF OUR TRIBE
ARISE FROM THE FACT THAT THE EAGLE
RIVER IS A PRINCIPAL TRIBUTARY OF THE
COLORADO RIVER IN WHICH WE HAVE A VI-
TAL AND CONTINUING INTEREST. OUR INTER-
EST WAS HIGHLIGHTED BY THE UNITED
STATES SUPREME COURT IN ARIZONA V CALI-
FORNIA WHEN THE COURT NOTED THAT OUR

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TRIBE POSSESSES PRIOR AND PREFERENTIAL RIGHTS WITH THE RESPECT TO THE WATER OF THE COLORADO RIVER 70 PERCENT OF ALL THE WATER IN THE COLORADO RIVER LIES IN THE STATE OF COLORADO WITH THE EAGLE RIVER BEING THE PRINCIPAL TRIBUTARY. IT THEREFORE SEEMS IMPERATIVE THAT SAID EAGLE RIVER JUDICATION BE TAKEN OFF CALENDAR BECAUSE OUR INTEREST AND POSITION HAS NOT BEEN PRESENTED TO THE COURT. WE ARE FULLY AWARE OF THE OCTOPUS-LIKE TENTACLES BELONGING TO ADVERSE INTERESTS THAT SEEK TO IGNORE AND DESTROY OUR WATER RIGHTS BY FORCING (?) US UNDER STATE LAW. WE THEREFORE URGENTLY REQUEST THAT YOU ACT UPON OUR REQUEST FOR THE MATTER TO BE TAKEN OFF CALENDAR.

MINERVA JENKINS
CHAIRMAN FORT MOJAVE TRIBAL COUNCIL

RAYMOND C SIMPSON
406 SECURITY BANK BLDG
110 PINE AVE L BCH 90802

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OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

October 27, 1970

Mr. Larry N. Olinger
Chairman
Agua Caliente Band of Mission
Indians Tribal Council
Long Beach, California

Dear Mr. Olinger:

I received your telegram of October 22, 1970, expressing your concern about the Eagle River litigation pending in the Supreme Court (Nos. 87 and 812, this Term). In these cases, the Supreme Court of the State of Colorado ruled (contrary to the contention of the United States) that the courts of that State have jurisdiction to determine all rights to the water of the river, including rights based on federal law. The United States has taken these cases to the Supreme Court for a ruling on our contention that the state courts are without jurisdiction to determine water rights based on federal law (including any Indian rights that may be involved).

If, as suggested in your telegram, the United States were to remove these cases from the Supreme Court calendar, the result would be to leave the determination of water rights based on federal law (including Indian rights) under the jurisdiction of the Colorado courts, rather than the federal courts. We do not understand how this would be beneficial to the interests of your tribe; indeed, we believe it would be harmful to those interests.

As you know, the Department of Justice has important responsibilities for the protection of Indian

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rights. We are not aware of any Indian water rights directly involved in this litigation, but we would appreciate detailed information concerning how the litigation might affect any Indian water rights of which you are cognizant so that we may advise the Court of them during the argument of the cases.

Very truly yours,
(Sgd.) Erwin N. Griswold
Erwin N. Griswold
Solicitor General

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

October 27, 1970

Miss Minerva Jenkins
Chairman
Fort Mojave Tribal Council
Long Beach, California

Dear Miss Jenkins:

I received your telegram of October 22, 1970, expressing your concern about the Eagle River litigation pending in the Supreme Court (Nos. 87 and 812, this Term). In these cases, the Supreme Court of the State of Colorado ruled (contrary to the contention of the United States) that the courts of that State have jurisdiction to determine all rights to the water of the river, including rights based on federal law. The United States has taken these cases to the Supreme Court for a ruling on our contention that the state courts are without jurisdiction to determine water rights based on federal law (including any Indian rights that may be involved).

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If, as suggested in your telegram, the United States were to remove these cases from the Supreme Court calendar, the result would be to leave the determination of water rights based on federal law (including Indian rights) under the jurisdiction of the Colorado courts, rather than the federal courts. We do not understand how this would be beneficial to the interests of your tribe; indeed, we believe it would be harmful to those interests.

As you know, the Department of Justice has important responsibilities for the protection of Indian rights. We are not aware of any Indian water rights directly involved in this litigation, but we would appreciate detailed information concerning how the litigation might affect any Indian water rights of which you are cognizant so that we may advise the Court of them during the argument of the cases.

Very truly yours,

[Sgd.] Erwin N. Griswold
Erwin N. Griswold
Solicitor General

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

November 6, 1970

Miss Minerva Jenkins
Chairman
Fort Mojave Tribal Council
Needles, California

Dear Miss Jenkins:

I received your telegram of November 4, 1970, yesterday, and I am grateful for its clarification of your

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views with respect to the Eagle River litigation (Nos. 87 and 812, this Term).

Your attorney, Mr. Raymond C. Simpson, conferred with Mr. Lawrence G. Wallace of my staff about this matter today. Mr. Wallace found Mr. Simpson's suggestions most helpful; and Mr. Simpson promised to furnish us additional materials and information for use in the future briefing and argument of these cases, which we very much appreciate.

Please be assured that the government intends to make the Supreme Court fully aware of its obligations as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights.

Very truly yours,

[Sgd] Erwin N. Griswold

[Sgd.] Erwin N. Griswold

Solicitor General

Friday, November 13, 1970

SUPREME COURT OF THE UNITED STATES

Present: Mr. Chief Justice Burger, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Harlan, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun.

Orders in Pending Cases

* * * * *

No. 87. United States, petitioner, v. District Court in and for the County of Eagle and State of Colorado et al.; and

No. 812. United States, petitioner, v. The District Court in and for Water Division No. 5, State of Colorado, et al. The application of the Solicitor General,

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consented to by all parties concerned, for a stay of the Colorado State Court proceedings before the District Court in and for Water Division No. 8, (sic) presented to Mr. Justice White, and by him referred to the Court, is granted insofar as such proceedings involve an adjudication of the rights of the United States, pending the decision of this Court in No. 87, and in No. 812 presently pending on a petition for a writ of certiorari.

FORT MOJAVE TRIBAL COUNCIL

California-Arizona-Nevada

P.O. Box 398
Needles, Ca 92363

LOC: 520 Courtwright Street
Indian Village
Phone: 713 326 3844

November 16, 1970

Mr. Pat Patencio
587 South Palm Canyon Drive
Palm Springs, California 92262

Dear Mr. Patencio:

I am enclosing a copy of a letter I have sent to the Navajo, Southern Ute, Ute Mountain, Uintah and Ouray, Chemehuevi, Hualapai, Havasupai, Colorado River, Cocopah and Quechan Tribes concerning the Eagle River case now before the Supreme Court.

As chairman of the group that met in Phoenix, you can be of help to us by getting together a meeting to discuss the need for having Indian interests advocated now, without waiting for legislation which may come too late for many of the cases that are pressing now;

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the legislation may never be passed and we need to face that fact.

Will you please distribute my letter to other tribes and consider setting up a meeting such as suggested?

Sincerely yours,

(sgd.) Minerva Jenkins

Mrs. Minerva Jenkins

Chairman

Encl

FORT MOJAVE TRIBAL COUNCIL

P.O. Box 798

Loc:-520 Courtwright Street

Indian Village

Needles, Ca. 92363

November 16, 1970

Dear Mr. Chairman:

The purpose of this letter is to call to your attention the case, Eagle River Adjudication, Nos. 87 and 812, pending in the supreme Court this term. This is an important matter that is of vital interest to Indian tribes that have rights to water of the Colorado River. In its broader aspects it should also be of interest to other tribes.

The Eagle River in Colorado is a tributary of the Colorado River. The Supreme Court of the State of Colorado had ruled in two cases that the State courts of Colorado have jurisdiction to determine all rights to the water of the Eagle River, including rights based on Federal law.

The Solicitor General in the Department of Justice, acting on behalf of the United States, has taken these cases to the Supreme Court.

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In doing this, though, the Justice Department did not assert the private rights of Indians held in trust by the United States; instead, it asserted the interests of the Government and attempted to join Indian interests with the Government interests.

You will recall that in his July 8 message to the Congress, the President in condemning the conflict of interest within the Justice and Interior Departments, pointed out very clearly that the rights of Indians and the rights of the United States are not one and the same thing. The President made the distinction in these words:

"The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the Government holds as trustee." (Emphasis by the President) After an exchange of correspondence with Mr. Erwin Griswold, the Solicitor General, Department of Justice, the Fort Mojave Tribe has been given the opportunity to make our interests in the *Eagle River* case known to the Justice Department prior to the argument of the case before the Supreme Court.

Tribes that have interests in water of the Colorado River and its tributaries are urged to join our Tribe by having your attorneys make your concern known to Mr. Griswold.

Other tribes should, if they share our view, let the President and the Vice President know that the Justice Department did not in this case, except upon prompting by us, recognize the distinction between the Government's and the Indians' interests. This case provides a good example of the need for the Indian Trust Coun-

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sel Authority legislation the President proposed; but, it also points out very dramatically the need for immediate Executive action to assure advocacy now for the Indian interests.

Sincerely yours,

FORT MOJAVE TRIBAL COUNCIL
Mrs. Minerva Jenkins
Chairman

Law Offices of
RAYMOND C. SIMPSON
Suite 406 Security Bank Building
Long Beach California 90802
Telephone Hemlock 5-8303

November 20, 1970

Mr. Erwin N. Griswold
Office of the Solicitor General
Washington, D. C. 20530
ATTENTION: Mr. Wallace

Gentlemen:

Re: Eagle River Litigation

Let me thank you for the courtesy extended me during my trip of a couple of weeks ago to Washington, D. C.

The primary purpose in writing this letter is to confirm my understanding that you agree with my basic position that Indian lands are privately owned lands held in trust by the United States of America for the benefit of the Indians, which, of course, means they are not embraced within the purview of statutes governing public lands. For this reason, it is critically important that the Supreme Court by (sic) made cognizant to the

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fact that an adverse decision in cases No. 87 or 812 for this term would result in an unjustifiable servitude upon the privately owned land and water of Indians. In other words, Indian trust lands cannot be permitted to come under state court jurisdiction in any determination of the Indian rights therein without resulting in a great loss and unrepairable damage with disastrous consequences to the Indians.

In keeping with my representation to you, and with my understanding that the cases will not be argued for three or four months, I will be transmitting a written statement pertaining to the Indian interest in the above-entitled litigation in the very near future.

Very truly yours,

[Sgd.] Raymond C. Simpson
RAYMOND C. SIMPSON

RCS/mh

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Law Offices of
RAYMOND C. SIMPSON
Suite 406 Security Bank Building
Long Beach California 90802
Telephone Hemlock 5-8303

November 28, 1970

Hon. Irwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

RE: Fort Mojave Indian Rights in
Eagle River Adjudication—
AMERICAN INDIAN
CRISIS on the Colorado
River

Dear Sir:

This will refer to my letter to you dated November 20, 1970, in regard to the above entitled matter. That letter specifically raised the issue of the threat stemming from failure to bring to the Supreme Court's attention the fact that Indian rights to the use of water are private in character and held in trust for the Indians, with the United States as trustee. Secondly, in view of that fact the waiver of sovereign immunity set forth in 43 U.S.C. 666 could not possibly have any application to those Indian rights. In the paragraphs which succeed the general objections to the present posture of the cases here involved will be discussed in more detail. By reason of earlier discussions with a representative of your office, I have not felt it essential to do more than present the objections to the cases in question by the Fort Mojave Indian Tribe without going into extensive detail in connection with the proceedings in the

District and Supreme Court of the State of Colorado which gave right (sic) to the review of those matters by the Supreme Court of the United States.

In that letter I referred to the case entitled: United States Petitioner v. The District Court in and for the County of Eagle and State of Colorado in the Supreme Court of the United States "No. 87, October Term 1970". Subject matter of the case originally initiated in the State Court of Eagle County, Colorado, are the rights to the use of water for the Eagle River. It is a principal tributary of the Colorado River within the State of Colorado.

Reference is also made to the Petition for a Writ of Certiorari filed October 7, 1970, by the United States. That case is entitled United States of America, Petitioner v. The District Court in and for Water Division No. 5, State of Colorado** No. 812, October Term 1970. Subject matter of the case as described in the Petition for a Writ of Certiorari are the rights for the use of water in Water Division No. 5. That water division encompasses the Eagle River referred to above and also according to the Petition of the United States * * * "the area drained by the Colorado River and its tributaries (excluding the Gunnison River)"**.

Succinctly stated, Water Division No. 5 recently established by the State of Colorado for the adjudication and administration of rights to the use of water under the jurisdiction of the State and its Courts. You chronicle the many and various agencies of the United States claiming rights to the use of water in that all important and large area which produces an extremely high proportion of the water supply of the Colorado River. As set forth in the Petition, those Federal Agencies include (1) the Department of the Interior; Bureau

of Reclamation, National Park Service, Bureau of Land Management, Bureau of Mines, Bureau of Sports, Fishery and Wild Life. (2) the Department of Agriculture; Forest Service. (3) The Department of the Navy which administers the naval petroleum and oil reserves. It is also stated in the Petition involving Water Division No. 5 that as in the Eagle River adjudication, Case No. 87, the United States claims appropriative rights pursuant to state law and also reserved and other rights to the use of water based upon Federal Law.

FORT MOJAVE TRIBE HAS DIRECT AND IMMEDIATE INTEREST IN THE SUBJECT MATTER OF CASES NO. 87 AND 812—IS GRAVELY THREATENED BY OMISSION OF INDIAN INTEREST IN THEM.

Since time immemorial the Mojave Indians have beneficially used the waters of the Colorado River to provide for their sustenance. That water is no less a part of their lives and heritage than the air they breathe. In fact, so significant is this that the origin of their Indian name "Aha-Ma-Cave" has been determined by outstanding anthropologists and archaeologists to mean "People of the River".

The Fort Mojave Tribe has had decreed to it the rights of the use of water from the mainstream of the Colorado River to irrigate a total of 18,974 irrigable acres. Their legal rights to the use of water for that acreage accords to them an entitlement of 122,640 acre feet of water annually. Recovery of possession of a very substantial irrigable acreage within the Fort Mojave Indian Reservation is expected which will materially increase their irrigable acreage with an attendant enhancement of their legal entitlement from the

mainstream of the Colorado River as decreed to them in the case of *Arizona v. California*, 373 U.S. 549 (1963).

It is understood that 70% of all the waters flowing to the Fort Mojave Indian Reservation of the mainstream of the Colorado River arises in the State of Colorado. A large proportion of that water has its source within Water Division No. 5 which is involved in case No. 812. A very substantial part of that water so essential to the Fort Mojave Rights is the Eagle River, which is the subject of the adjudication in case No. 87.

Of necessity the Fort Mojave Indian Tribe must have asserted its rights in the tributaries to the mainstream of the Colorado for without the water from those tributary streams, and particularly those in Water Division No. 5 and Eagle River, its rights would be most seriously invaded. Without those sources of water the Mojave rights would, of course, be vacuous as the entitlement in the mainstream of the Colorado River held by the Mojave is totally dependent upon the water supplied by the tributaries.

**FORT MOJAVE INDIAN TRIBE THREATENED
BY SHORTAGE OF WATER IN THE COLO-
RADO RIVER AND THE POLLUTION OF
THAT STREAM.**

Any decree which might be entered in either the Eagle River Adjudication or in Water Division No. 5 can have no other effect than to establish uses of the waters within those tributary areas. That upstream use will materially reduce the quantities of water entering the Colorado River which would otherwise flow to the Fort Mojave Indian Reservation. It is a matter of indisputable record that the Colorado River has been

most seriously over-appropriated. Water yields from the Colorado River reaching the Fort Mojave Indian Reservation fall far short of the anticipated flows when the River was originally apportioned between the Upper and Lower Basins of the Colorado.

A threat equally serious to the Fort Mojave Indians as the grave shortage of water now confronting them is the pollution of that stream. Salinity has increased very rapidly in the Colorado River due to reservoir evaporation losses and the salts which enter that River under present development. Projects are now building—particularly the Central Arizona Project—which constitute an even greater threat both as to quantity and quality of the water if those projects proceed to completion.

As a consequence, any reduction of water in the Colorado River by reason of tributary uses and Water Division No. 5 creates an intolerable situation. Manifestly the decrees in the State of Colorado must be entered in contemplation of the fact that the Fort Mojave Indian Tribe, and indeed many other tribes within the Colorado River drainage, hold legal rights to the use of water, which rights must be protected.

**FORT MOJAVE INDIANS' RIGHTS IN THE
COLORADO RIVER AND ITS TRIBUTARIES
—PRIVATE INTERESTS IN REAL PROPER-
TY HELD IN TRUST FOR THEM BY THE
UNITED STATES.**

It is of course elemental that the rights to the use of water by the Fort Mojave Indian Tribe and the Colorado River and its tributaries are interests in real property of the highest dignity. Those rights, as asserted above, although in the mainstream of the Colorado

River, necessarily extend to the sources of water which are the tributaries of that stream including in particular the mainstream and the tributaries in Water Division No. 5 and, of course, the Eagle River.

President Nixon in his July 8, 1970, Message to the Congress, stressed that the American Indian rights to the use of water are "private" in character, held in trust for them by the United States. The Mojave rights are not "public" in character. They are distinct and separate from the rights claimed and administered by the agencies of the Department of the Interior, Agriculture, and Navy alluded to in the Petition for Certiorari and Water Division No. 5. That distinction is also of course equally applicable to the Eagle River Adjudication in which the only claims asserted by the United States pertain to the Forest Service and the Bureau of Land Management.

**FAILURE IN EAGLE RIVER ADJUDICATION NO.
87 PROPERLY TO ASSERT OR IDENTIFY
THE INDIAN RIGHTS TO THE USE OF WAT-
ERS IN THAT STREAM AS BEING HELD IN
TRUST FOR THE FORT MOJAVE INDIANS.**

There has been a failure to distinguish or to indeed make reference to the private rights of the Fort Mojave Indians in the Eagle River Adjudication. A similar omission is likewise made in the Petition for Certiorari in the Water Division No. 5 Case No. 812.

That failure is all pervasive. It is exemplified in this quoted excerpt from the Petition of Certiorari filed in that case: "Reserved rights (of the United States) have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the Public Domain as is necessary

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to fulfill the purposes for which the lands were withdrawn, subject only to the water rights vested as of the date of the withdrawal. Arizona v. California, 373 U.S. 546, 595-601", Petition for Writ of Certiorari** Case No. 87, p. 3 That paraphrasing of the decision of Arizona v. California last cited is most critical to the Fort Mojave Tribe. Most assuredly the Mojave rights are not an "entitlement of the United States to use**" water. Rather as the citation when considered in context revealed that the Mojave and other Indian rights to the use of water are recognized and distinguished from those of the United States for public purposes.

Again failure to establish the all important difference between the "private" rights of the Indians held in trust for them by the United States from those of the Federal Government held for the public as a whole is this statement from the brief filed with the Supreme Court: "As indicated previously** the United States unquestionably has the right to use as much water from sources on lands withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn**". Not only is the statement incorrect, it is to be noted that there are four cases cited in the brief to support the contention. Three of the cases relate exclusively to Indian rights and the fourth relates predominantly to Indian rights. Brief for the United States, Case No. 87, p. 10, all of which underscores the imperative deed clearly to distinguish the Indian rights from those of the public.

In keeping with the tone and temper of the erroneous excerpt quoted from the Petition of Certiorari and the briefs filed in case No. 87 is this excerpt taken from the Petition and paraphrased in the brief: "The magni-

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tude of the problem is indicated by the fact that about four hundred forty-three million acres have been withdrawn from the Public Domain for use as Indian reservations, national parks, national forest, national recreation areas, national monuments, etc." Petition for Certiorari** P. 10-11. Failure to separate and distinguish the lands of the American Indians from the public lands evidences the incorrect position which has been presented to the Supreme Court in regard to the private interests of the Indian. From the legal aspects of the matter an intolerable circumstance is presented not only for the Fort Mojave Indian Tribe but also for all American Indians whose lands and rights to the use of water are in effect intermingled with the "reserve" lands and rights to the use of water for the public at large.

FAILURE TO ASSERT IN CASES NOS. 87 AND 812 THAT THE WAIVER OF SOVEREIGN IMMUNITY FROM SUIT IN 43 U.S.C. 666 DID NOT INCLUDE THE RIGHTS TO THE USE OF WATER OF THE FORT MOJAVE TRIBE OF INDIANS OR INDEED THE RIGHTS OF ANY OTHER INDIANS—A MOST SERIOUS THREAT TO THE INDIANS.

Gravest consequence to the Fort Mojave Tribe of Indians will necessarily ensue by the failure of the petitions for certiorari and the brief in the Eagle River Adjudication to emphasize to the Supreme Court that the waiver of sovereign immunity from suit in 43 U.S.C. 666 does not in any way pertain to the Indian rights

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and (sic) to the use of water. It is basic law that unless the Indian immunity from suit is specifically waived by the Congress that immunity is unimpaired. From the language of 43 U.S.C. 666 it is abundantly manifest that the Congress did not intend to include the rights of the American Indians within the scope of that waiver. If construction of the Act were permissible, which is denied, the legislative history would result in the rejection of any concept as to the applicability of the Act to the Indian rights and interests.

Failure to distinguish the Indian rights from the public rights of the Federal Government might very well result in a decision by the Supreme Court that could be construed as embracing those rights within 43 U.S.C. 666. Quite clearly that would be intolerable to the Indians. The result might be to subject the rights of the American Indians to the administration of the state under the laws of the states. Because of the state laws governing rights to the use of water are frequently incompatible with the laws which govern the Indian rights to the use of water, the extreme prejudice to the Indian rights is clear beyond question. In short, the repeated failure to bring to the Supreme Court's attention the disparity between the laws governing the Indian rights and the laws governing the public rights of the United States could result in serious impairment or extinguishment of the Indian rights. It is not an over statement to declare that the Indian lands to a large extent would become uninhabitable if those rights were seriously infringed upon or, as stated, extinguished.

SUGGESTION TO THE SUPREME COURT OF
COLORADO THAT THE UNITED STATES
WOULD VOLUNTARILY APPEAR AS PLAINTIFF
IN STATE COURT PROCEEDINGS
WHOLLY UNACCEPTABLE TO THE FORT
MOJAVE INDIAN TRIBE IN THE PRESENT
STATE OF THE RECORD.

It was expressly stated by the United States when it was before the Supreme Court of Colorado in the Eagle River Adjudication that it might be willing to appear in the State Court as plaintiff. Any action of that character would, of course, be objectionable to the Fort Mojave Indian Tribe for exactly the same reasons that it has interposed objection by this letter in connection with the brief and petitions of certiorari which have been discussed above. Clearly the interests of the Fort Mojave Tribe would be prejudiced if the United States undertook to appear as plaintiff and failed fully to assert the Indian rights in the tributary streams of the Colorado River. Moreover in the ultimate if the United States were to subject itself to the jurisdiction of the State Court, all of the rights which are involved and there presented would probably be subject to state law and the control and administration of state officials. That circumstance would, as stated, be intolerable to the Indians.

I intend to be in Washington for conferences with officials of the Department of the Interior during the week of December 7, 1970. At that time I would greatly appreciate an opportunity to meet with you and members of your staff. We could then discuss fully the objections which the Fort Mojave Indian Tribe and other tribes adversely affected have to the present situation

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in the cases to which this letter is directed in order to determine what affirmative action should be taken to protect the Indian rights involved.

Yours very truly,

[Sgd.] Raymond C. Simpson

RAYMOND C. SIMPSON

Fort Mojave Tribal Attorney

RCS/af

Res. No. 70-23

RESOLUTION

Fort Mojave Tribe
of the Fort Mojave Reservation
California, Arizona and Nevada

Whereas, the Fort Mojave Indian Tribe of the Fort Mojave Indian Reservation has a long established policy with the objective of protecting and preserving the Tribe's rights to the use of water in the Colorado River and their entitlement to water both as to quality and quantity, and

WHEREAS, the Tribe in furtherance of that policy directed its Attorney Raymond C. Simpson to take appropriate steps in regard to protecting the Tribe's rights in the Colorado River and its Tributaries as they may be effected by the case of United States v. District Court of Eagle County, Colorado case No. 87 now before the Supreme Court and the case entitled United States v. District Court for water Division No. 5, No. 812 concerning which the United States is now seeking review by the Supreme Court,

NOW, THEREFORE, the Tribal Council having fully considered the letter dated November 28,

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1970 directed to the Hon. Erwin N. Griswold, Solicitor General, Department of Justice, which letter was prepared by the above mentioned Attorney Raymond C. Simpson, does hereby approve that letter to which this resolution is attached and hereby directs the foresaid Raymond C. Simpson to proceed in conformity with that letter to take all steps necessary to preserve and protect the Tribe's rights in the Colorado River and its tributaries as they relate to the above mentioned cases including but not limited to attending the proposed conference with the Solicitor General and for all other purposes.

Certification

We, the undersigned, as the chairman and the secretary, hereby certify that the Fort Mojave Tribal Council is composed of six members, of whom five, constituting a quorum, were present at a special meeting on the 30th day of November and that the foregoing resolution was adopted by five affirmative votes.

FORT MOJAVE TRIBAL COUNCIL

(Sgd.) Minerva Jenkins
Minerva Jenkins, Chairman

(Sgd.) Jeannette Otero
Jeannette Otero, Secretary

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OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

December 3, 1970

Raymond C. Simpson, Esquire
Suite 406 Security Bank Building
Long Beach, California 90802

Dear Mr. Simpson:

Thank you very much for your letter to the Solicitor General of November 28, 1970, which we received today. As anticipated in our earlier conversation, the information and views contained in your letter will be helpful in our handling of the Eagle River cases.

The Solicitor General has asked me to handle this matter and to keep him informed about it. I will be happy to see you when you are in Washington during the week of December 7, 1970. The latter part of the week (either Thursday or Friday) will be more convenient for me since I am arguing a case in the Supreme Court on Wednesday (according to the Court's tentative schedule).

Yours sincerely,

(Sgd.) Lawrence G. Wallace
Lawrence G. Wallace
Deputy Solicitor General

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Law Offices of RAYMOND C. SIMPSON
Suite 406 Security Bank Building
Long Beach, California 90802
Telephone Hemlock 5-8303
December 11, 1970

Hon. Irwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

RE: Fort Mojave Indian Rights
in Eagle River Adjudication—
AMERICAN INDIAN CRISIS on
the Colorado River.

Dear Sir:

On behalf of the Fort Mojave Tribe, I wish to thank you for the courtesy extended by Mr. Clark of your office during my recent visit to Washington. At that time we discussed in detail the contents of my letter addressed to you dated November 28, 1970, and thereafter expressed a wish to file an Amicus Brief respecting our position in the Eagle River Adjudication.

Hence, pursuant to the suggestion of Mr. Clark, I request that you consider this letter as constituting the formal request of the Fort Mojave Tribe for you (six) consent to file an Amicus Brief in consolidated cases 87 and 812 involving the Eagle River litigation presently pending in the United States Supreme Court.

Thanking you in advance for your anticipated cooperation and permission.

Very truly yours,
(Sgd.) Raymond C. Simpson
RAYMOND C. SIMPSON
Tribal Attorney

RCS/mh

cc: Fort Mojave Tribal Council
Mr. LaFollette Butler
Mr. Bill Veeder

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Telegram

DUPLICATE AND CORRECTED COPY

DEC 14 PM 9 22 (1970)

COMMISSIONER LEWIS BRUCE

BUREAU OF INDIAN AFFAIRS WASH DC
MOJAVE INDIAN TRIBE REQUEST ASSISTANCE
FROM MR. VEEDER IN EAGLE RIVER ADJUDI-
CATION AND IN WATER DIVISION NUMBER 5
ADJUDICATION ARISING IN STATE OF COLO-
RADO AND HIS AUTHORIZATION TO COOPER-
ATE WITH ME IN REGARDS TO THAT LITI-
GATION STOP SHORTAGE OF TIME MAKES
THIS ASSISTANCE AND AUTHORIZATION IM-
PERATIVE IMMEDIATELY.

RAYMOND C. SIMPSON
TRIBAL ATTORNEY
FT MOJAVE INDIANS

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WILKINSON, CRAGUN & BARKER
Law Offices

1616 H Street, N. W.
Washington, D. C. 20006
National 8-4400

* * *

December 22, 1970

The Honorable Irwin H. Griswold
Solicitor General
Department of Justice
Washington, D.C. 20530

Re: Eagle River Adjudication (No. 87) and
Water Division No. 5 Adjudication
(No. 812) In the State of Colorado

Dear Mr. Solicitor General:

We are attorneys for the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Hoopa Tribe of the Hoopa Valley Reservation, California, the Quinault Tribe of Washington, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the National Congress of American Indians. We have become aware of the Eagle River adjudication (No. 87) and Water Division No. 5 adjudication (No. 812) which are presently pending before the Supreme Court in the United States. The above named tribes as well as the National Congress of American Indians, are gravely concerned that important questions affecting Indian water rights have been raised in the cases without a proper statement of the Indian position on these questions.

We have been supplied with a copy of the letter to you from Mr. Raymond C. Simpson, dated November

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28 1970. We support the general premises urged therein—that the United States has heretofore failed to distinguish the particular “private” rights of Indians to the use of water from rights claimed and administered by various federal agencies characterized as “reserved” rights of the United States. We request that in future briefs filed by the United States in these cases the United States call the attention of the Supreme Court to the error in the statements heretofore made in the briefs filed in Docket No. 87. Moreover, it should be made plain to the Court that, irrespective of its effect on water rights of the United States, Congress never intended in 43 U.S.C. 666 to waive the sovereign immunity of Indian tribes from suit and subject them to the vagaries of state court proceedings with respect to their water rights.

We are advised by Mr. Simpson that he has been invited to file an *amicus* brief on behalf of the Fort Mojave Tribe of Indians. In addition, we understand that it was agreed that Mr. Simpson would submit a memorandum to the Department of Justice and it would be considered before further briefs in these cases are filed by the United States.

Because of the extreme importance of these matters, we would like the opportunity to discuss the Indian water rights questions raised with your staff prior to the completion and filing of any further briefs in these cases.

Sincerely yours,

WILKINSON, CRAGUN & BARKER
By: Glen A. Wilkinson

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WILKINSON, CRAGUN & BARKER
Law Offices

December 22, 1970

The Honorable Louis R. Bruce
Commissioner
Bureau of Indian Affairs, Room 233
1951 Constitution Avenue, N.W.
Washington, D. C. 20242

Re: Eagle River Adjudication and
Water Division #5 Adjudication

Dear Commissioner Bruce:

We are attorneys for the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Hoopa Tribe of the Hoopa Valley Reservation, California, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, the Quinault Tribe of the Quinault Reservation, Washington, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the National Congress of American Indians. As you are no doubt aware the Supreme Court has granted *certiorari* in the Eagle River adjudication (No. 87) and the Water Division No. 5 adjudication (No. 812) both in the state of Colorado. Both of these cases involve questions which might seriously affect Indian water rights.

We hope to work with the Department of Justice to assure that the position of the Indians is not neglected in these briefs. In that regard, we hereby request assistance from Mr. William Veeder in our work concerning the Eagle River adjudication and the Water Division No. 5 adjudication. Furthermore, we request that he be authorized to cooperate with us on that litigation.

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We enclose a copy of a letter we have sent today to the Solicitor General concerning these cases.

Since the writ of *certiorari* was granted in Water Division No. 5 adjudication on December 7, 1970, time is of the essence. We look forward to hearing from you on this matter very soon.

Sincerely yours,

WILKINSON, CRAGUN & BARKER

(Sgd.) Glen A. Wilkinson

By: Glen A. Wilkinson

Enclosure

[Filed January 14 1971]

In the Supreme Court of the United States October Term, 1970 No. 812.

United States of America, Petitioner v. The District Court in and for Water Division No. 5, State of Colorado, and the Judge Thereof, the Honorable Clifford H. Darrow, and the Water Referee Thereof.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF FOR THE UNITED STATES

* * * * *

QUESTIONS PRESENTED

[See *supra* this APPENDIX page 1]

* * * * *

STATUTES INVOLVED

[See *supra* this APPENDIX pages 1 & 2]

* * * * *

The Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148-21-1 *et seq.* provides in pertinent part:

148-21-3. Definitions.—(1) For the purposes of this article, unless the context clearly indicates a different meaning:

(2) "Person means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States of America, or any other legal entity public or private.

* * * * *

148-21-18. Applications for water rights or changes of such rights—plans for augmentation.

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—(1) Any person who desires a determination of a water right or a conditional water right and the amount and priority thereof including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, a determination with respect to a change of a water right, approval of a plan for augmentation or biennial finding of reasonable diligence, shall file with the water clerk in duplicate a verified application setting forth facts supporting the ruling sought. Any person who wishes to oppose the application may file with the water clerk in duplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions. Such statement of opposition must be filed by the last day of the second month following the month in which the application is filed. The fee for filing an application shall be twenty-five dollars; and for filing a statement of opposition, the fee shall be fifteen dollars.

* * * * *

(4) The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board, and other state agencies.

* * * * *

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148-21-22. Priorities junior to prior awards—when.—With respect to the divisions described in section 148-21-8 priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

STATEMENT

This case raises essentially the same issues involved in *United States v. The District Court in and for the County of Eagle and State of Colorado* No. 87, this Term, certiorari granted, 397 U.S. 1005, but in the context of the Colorado Water Right Determination and Administration Act of 1969 Colo. Rev. Stat. 148-21-1 *et seq.*, which has superseded the statutory provisions underlying the *Eagle County* case.

* * * * *

* * * Because of the size of new Water Division No. 5, however, the water rights of the United States involved in this case are more numerous than those involved in *Eagle County*.² The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior—through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife—uses water in Water Division No. 5 for recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Re-

²This footnote omitted here.

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serves in the area which, when developed, would require water to accomplish the federal purpose for which the reservation was made.

SUMMARY OF ARGUMENT

We rely primarily on our brief submitted in *Eagle County, supra*, No. 87, this Term, and limit our discussion here to the significance of the changed Colorado water right adjudication procedures. In support of our argument that Congress did not consent to the adjudication of federal *reserved* water rights in state court proceedings, we point out that under the limited procedures of the 1969 Colorado Act, Colo. Rev. Stat. 148-21-1 *et seq.*, it is highly unlikely that the federal reserved rights will be recognized. Because Congress was undoubtedly aware of the fundamental inconsistency between reserved water rights existing under federal law and appropriative water rights—which the laws of the western states are designed to determine and protect—we submit that Congress plainly did not intend through the enactment of 43 U.S.C. 666 to jeopardize federal reserved rights by subjecting them to state adjudications, but intended merely to submit federal claims arising under state law to state procedures.

In Part II, we show that the monthly proceedings of limited scope authorized by the 1969 Colorado statute do not constitute the type of general adjudication to which the United States may be made a party under the federal consent statute.

ARGUMENT

* * * * *

Section 148-21-22 of the 1969 Act provides:

Priorities junior to prior awards—when.—With respect to the divisions described in section 148-21-8, priorities awarded in any year for water

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rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

This provision would appear to foreclose as to all unadjudicated federal reserved—as well as appropriative—water rights, the recognition of pre-1969 priority dates. There thus appears to be no means under the 1969 Colorado statute for perfecting federal reserved water rights. This re-emphasizes our submission that an interpretation of 43 U.S.C. 666 as embodying consent to reserved water right adjudication might effectively eliminate federal reserved rights and drastically affect the management of federal lands in Colorado and other western states.³

II

The Monthly Proceedings Authorized By The Colorado Water Right Determination And Administration Act of 1969 Are Not Suits To Which The United States Has Consented To Be Joined Under 43 U.S.C. 666 Regardless Of The Nature Of The Rights Claimed By The United States

Again, we rely primarily on our *Eagle County* brief, in which we argued at pages 24-30 that the Colorado procedures there at issue did not provide for the type of adjudication proceedings covered by 43 U.S.C. 666.

³To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division No. 5 relate to Indian lands. In the event this Court should rule that 43 U.S.C. 666 subjects federal reserved rights in general to state adjudication, there would remain the further question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public.

In our view, however, the new state procedures authorized by the 1969 Act to determine and administer water rights are even more clearly not within the scope of the federal consent statute than the procedures they supersede.⁴

The Federal courts which have construed 43 U.S.C. 666 have concluded that Congress intended to waive the sovereign immunity of the United States only in general water right adjudications. See *Dugan v. Rank*, 372 U.S. 609, 618-619; *Miller v. Jennings*, 243 F.2d 157, 159 (C.A.5), certiorari denied, 355 U.S. 827; *Eagle County Br.* 25-27. The essential elements of the proceedings to which the United States has consented to be joined as a defendant, as described in these decisions as well as in the legislative history of the federal statute (see our Brief in No. 87, pp. 12-15), are that all the water users and all the water rights on a stream must be joined in the action before the court and all the rights of the parties be determined as between themselves. These elements constitute the essence of a "general adjudication."

The proceedings under the 1969 Act do not approach such a general adjudication. The only water rights involved in the monthly proceedings before the water referee are those for which an application was made during the preceding month and which are listed on the resume prepared by the water clerk. Section 148-21-18. The Act does not require that all or any particular number of claimants to water from a particular or common source be joined, nor does it pro-

⁴One defect of the old procedures have been mitigated, however, since each of the seven new divisions is obviously more likely to encompass a stream system within the meaning of 43 U.S.C. 666 than were any of the 70 districts under the old law.

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vide for a determination *inter sese* of such claims. Neither the statute nor the notice thereunder demands or requires that the United States or any other water user in a division file an application or claim in order that it can be determined along with all others or even those included in the notice. Instead, the statute provides only that (Colo. Rev. Stat. 148-21-18(1)):

Any person who wishes to oppose the application may file with the water clerk in duplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions.

The result of the application and permitted response is that a water referee will consider the particular month's applications and any statements in opposition filed and, without holding a formal hearing, make his ruling.⁵

In the instant case, the notice of applications filed during the month of December 1969 in Water Division 5 and mailed to the Attorney General contained 17 applications (App. 17-25). These 17 applications and any oppositions filed thereto delimit the subject matter of the proceedings before the referee pursuant to this notice. The proceeding is thus limited to a mere fraction of the rights and claimants to water from sources within the area of Water Division 5. Were the United States to respond to the December notice and file a statement in opposition, the result would not be a decree finally determining all of the rights to use water in the division among all claimants, but a ruling

⁵Under Section 148-21-19(2), the referee has the option of referring the matter to the water judge without making a ruling.

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pertaining only to those 17 applications filed. As noted above (*supra*, p. 12), in response to this notice the United States is neither asked nor permitted to submit its claims. For the claims of the United States to be the subject of a decree, the United States must affirmatively initiate a proceeding by filing an application for a water right under Section 148-21-18.

Respondents may assert that there are compelling reasons why the United States should, as a matter of policy, voluntarily submit its claims to state courts for determination.⁶ That question, however, is not before the Court since 43 U.S.C. 666 is clearly not a statute directing the Department of Justice to initiate proceedings on behalf of the United States, but simply permits joinder of the United States as a defendant in proper suits. We submit that the limited monthly adjudication proceedings established by the 1969 Act are not the type of suits covered by the federal consent statute.

* * * * *

* * *

Solicitor General

* * *

January 1971.

⁶See the brief of the State of Wyoming as *amicus curiae* filed in Eagle County, No. 87, this Term. The *amicus* briefs of other states make similar suggestions.

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United States Government

MEMORANDUM

Date: January 19, 1971

To: William H. Veeder

From: Leon F. Cook, Acting Director, Economic Development

Subject: Requests for assistance and direction as to requests, in regard Eagle River Adjudication and Water Division No. 5, Cases Nos. 87 and 812 before the Supreme Court.

Attached are copies of responses to requests from attorneys for the Fort Mojave Tribe of Indians and the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Hoopa Tribe of the Hoopa Valley Reservation, California, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, the Quinault Tribe of the Quinault Reservation, Washington, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the National Congress of American Indians.

In accordance with those responses you are directed to undertake an in-depth analysis of the facts and law respecting those cases as they relate to (1) overall precedents as to American Indian rights to the use of water; (2) American Indian rights in the Colorado River drainage system.

(Sgd.) Lee
Leon F. Cook

Attachments

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UNITED STATES DEPARTMENT OF THE
INTERIOR

BUREAU OF INDIAN AFFAIRS

Washington, D. C. 20242

January 21, 1971

Mr. Glen A. Wilkinson
Wilkinson, Cragun & Barker
1616 H. Street N. W.
Washington, D. C. 20006

Dear Mr. Wilkinson:

Thank you for your letter dated December 22, 1970, in regard to the Eagle River Adjudication and Water Division No. 5, cases now pending before the Supreme Court of the United States. Both cases involve the Colorado River stream system.

In accordance with your letter Mr. Veeder has been directed to undertake a full review of those cases as they relate to the rights to the use of water of the American Indians within the Colorado River drainage and as to the broader aspects of the precedents which may emerge from the decisions of the Court.

Sincerely yours,

(Sgd.) Louis R. Bruce
Commissioner

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UNITED STATES DEPARTMENT OF THE
INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, D. C. 20242

January 21, 1971

Mr. Raymond C. Simpson
406 Security Bank Building
110 Pine Avenue
Long Beach, California 90802

Dear Mr. Simpson:

Thank you for your telegram dated December 16, 1970, in regard to the Eagle River Adjudication and Water Division No. 5, cases now pending before the Supreme Court of the United States. Both cases involve the Colorado River stream system.

In accordance with your telegram Mr. Veeder has been directed to undertake a full review of those cases as they relate to the rights to the use of water of the American Indians within the Colorado River drainage and as to the broader aspects of the precedents which may emerge from the decisions of the Court.

Sincerely yours,
(Sgd.) Louis R. Bruce
Commissioner

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HARTLEY, OLSON & BACA

Attorneys at law

P. O. Box 465

311 Sixth Street, N.W.

Albuquerque, New Mexico 87103

February 12, 1971

The Honorable Louis R. Bruce
Commissioner of Indian Affairs
1745 N Street
Washington, D. C.

Re: Eagle River Adjudication—State of Colorado
#87, October Term, 1970—Supreme Court

Dear Commissioner:

Your attention is invited to the Eagle River Adjudication suit in the State of Colorado (United States vs. The District Court in and for the County of Eagle, State of Colorado, No. 87, October term, 1970, United States Supreme Court). As attorney for the All Indian Pueblo Council and several of the individual Indian tribes within New Mexico, I am gravely concerned over the far-reaching effects of the decision in this case, should the United States Supreme Court sustain certain views which are being presented therein. The precedents to be established may have far reaching effects and are of major concern to the Indian Pueblos of New Mexico, particularly as they may affect the present Rio Grande Adjudication.

Accordingly, I think most serious attention must be given by you and your staff to the positions taken in this case to see that the Indian interests are protected. Further, may I suggest that your immediate and prompt

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attention be given to this case with the thought in mind that perhaps a conference may be arranged at an early date between your appropriate staff members and the attorneys representing Indian tribes whose water rights may be directly or indirectly affected by the decision.

We thank you for your attention to this matter.

Very truly yours,

HARTLEY, OLSON & BACA

(Sgd.) Thomas O. Olson

Thomas O. Olson

TOO/cj

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Supreme Court, U.S.

FILED

FEB 12 1971

E. Robert Seaver, Clerk

Available—February 16, 1971

In the Supreme Court of the United States, October Term, 1970. No. 812.

United States of America, *Petitioner* v. The District Court in and for Water Division No. 5, State of Colorado, and the Judge Thereof, the Honorable Clifford H. Darrow, and the Water Referee Thereof.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF OF RESPONDENT COURT AND THE
COLORADO RIVER WATER CONSERVA-
TION DISTRICT

* * * * *

February 12, 1971

STATUTES INVOLVED

* * * * *

148-21-17. Administration and distribution of waters.

—(1) The state engineer shall be responsible for the administration and distribution of the waters of the state, and in each division such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on the effective date of this article and by the priorities for water

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rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of water of the state.

* * * * *

148-21-20. Proceedings by the water judge.—(1) On . . . the first Tuesday of April and October in division 5 . . . the water judge for the . . . division shall commence hearings with respect to the subject matter of protests filed and orders of rereferral entered by the referee during the preceding six calendar months. Such matters shall generally be considered by the water judge in chronological order, however, the dates and times of hearings shall be adjusted by the water judge at his discretion for the convenience of persons involved or for other reasonable cause.

* * * * *

(5) A decision of the water judge will respect to a protested ruling of the referee shall either confirm, modify, reverse or reverse and remand such ruling, and in the case of the modification of a ruling the decision may grant a different priority than that granted by the referee and may specify its own terms and conditions with respect to a change of water right or plan for augmentation. A decision of the water judge in regard to a matter which has been rereferred by the referee shall dispose fully of such matter and may contain such provisions as the water judge deems appropriate. The water judge shall confirm and approve as part of his judgment and decree a ruling of the referee with respect to which no protest was filed, provided that the water judge may reverse or reverse and remand any such ruling which he deems to be contrary to law.

(9) Appellate review shall be allowed to the judgment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed.

QUESTIONS PRESENTED³

- (1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.
- (2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

STATEMENT

This case raises in our view the identical questions, stated just above, as posed in *United States v. The District Court in and for the County of Eagle and State of Colorado, et al.*, No. 87, this term (hereinafter No. 87). There are, of course, certain factual differences which we treat in this statement, but the same basic issue of state court jurisdiction is presented in both cases.

* * * * *

The Colorado Supreme Court had already decided precisely the opposite in the *Eagle County* case (No. 87) and thus promptly denied, *en banc*, the writ applied for (App. 27). The United States then filed here for certiorari and, just as in No. 87, we supported the application for the writ because of the importance of a

³This footnote omitted here.

decision now on the same basic question of jurisdiction which both cases present.⁹

SUMMARY OF ARGUMENT

The jurisdictional issue, which is all this Court need decide to dispose of both cases, was offered in sharp focus by the United States when it came here seeking certiorari in No. 87. There, after admitting the decision below did not terminate the entire litigation, to assure the Court there was finality of judgment below permitting review, the Government noted:

" . . . Since [the jurisdictional] issue is *clearly separable* from the merits of the litigation pending in the State district court (the relative rights and priorities of the claimants of water rights in Water District 37), and is not subject to further review in the Colorado courts, the judgment is final for purposes of this Court's jurisdiction. . . ." (Pet. in No. 87, then No. 1178, Oct. Term, 1969 at 9, emphasis added).

This "clearly separable" issue, as stated by the United States was whether:

" . . . the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United Statse, including its reserved rights." (id.)

* * * * *

⁹In conferences among counsel while the petition for certiorari was pending in No. 812 there was mutual recognition of the desirability for ongoing proceedings on water matters in the respondent court in the interests of the proper administration of the 1969 Act and, at the same time, of the effect that the various deadlines in that Act could have upon any rights of the United States in its absence. This led to an unopposed request for a stay by this Court, which stay has been implemented by agreement among counsel on the language to be inserted in decrees which will hold the rights of the United States in status quo pending the decision of this Court.

(See APPENDIX, Page 58.)





NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 87. Argued March 2, 1971—Decided March 24, 1971

This case arises from the attempted joinder pursuant to 43 U. S. C. § 666 of the United States as a defendant in a proceeding in state court for the adjudication of water rights covering the Eagle River system in Colorado. Under § 666 (a) "[c]onsent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States [owns] or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise" The United States contended that § 666 applies only to water rights that it had acquired under state law and does not constitute consent to have adjudicated in a state court the Government's reserved water rights arising from withdrawals of land from the public domain. Its objection was overruled by the trial court and the Colorado Supreme Court denied the Government's motion for a writ of prohibition. *Held*: Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within a particular State's jurisdiction regardless of how they were acquired. Any conflict between adjudicated rights and reserved rights of the United States, if preserved in the state proceeding, can ultimately be reviewed in this Court. Pp. 2-5.

— Colo. —, 458 P. 2d 760, affirmed.

MR. JUSTICE DOUGLAS delivered the opinion for a unanimous Court. MR. JUSTICE HARLAN, though joining in the opinion, filed a concurring statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 87.—OCTOBER TERM, 1970

United States, Petitioner,

v.

District Court in and for
the County of Eagle
and State of Colorado
et al.

On Writ of Certiorari to the
Supreme Court of Colorado.

[March 24, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Eagle River is a tributary of the Colorado; and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. The present case started in the Colorado courts and is called a supplemental water adjudication under Colo. Rev. Stat. 1963, 148-9-7. The Colorado court issued a notice which, *inter alia*, asked all owners and claimants of water rights in those streams "to file a statement of claim and to appear . . . in regard to all water rights owned or claimed by them." The United States was served with this notice pursuant to 43 U. S. C. § 666.¹ The United States moved to be dismissed as a

¹ 43 U. S. C. § 666 (a), 66 Stat. 560, provides:

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have

party, asserting that 43 U. S. C. § 666 does not constitute consent to have adjudicated in a state court the reserved water rights of the United States.

The objections of the United States were overruled by the state District Court and on a motion for a writ of prohibition the Colorado Supreme Court took the same view. — Colo. —, 458 P. 2d 760. The case is here on a petition for certiorari, which we granted. 397 U. S. 1005.

We affirm the Colorado decree.

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U. S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian reservations. *Id.*, 598-601. The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave. *Id.*, 600-601. Here the United States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted into the Union in 1876.

The United States points out that Colorado water rights are based on the appropriation system which requires the permanent fixing of rights to the use of water at the time of the adjudication, with no provision for

waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under the circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

the future needs, as is often required in case of reserved water rights.² *Arizona v. California*, at 600-601. Since those rights may potentially be at war with appropriated rights, it is earnestly urged that 43 U. S. C. § 666 gave consent to join the United States only for the adjudication of water rights which the United States acquired pursuant to state law.

The consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source" would seem to be all-inclusive. We deem almost frivolous the suggestion that the Eagle and its tributaries are not a "river system" within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The "river system" must be read as embracing one within the particular State's jurisdiction. With that to one side, the first clause of § 666 (a)(1), read literally, would seem to cover this case for "rights to the use of water of a river system" is broad enough to embrace "reserved" waters.

The main reliance of the United States appears to be on Clause 2 of § 666 (a) which reads:

" . . . for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise."

This provision does not qualify § 666 (a)(1), for (1) and (2) are separated by an "or." Yet even if "or" be read as "and," we see no difficulty with Colorado's position. Section 666 (a)(2) obviously includes water rights previously acquired by the United States through appropriation or presently in the process of being so acquired.

² See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446; *Mason v. Hill Land & Cattle Co.*, 119 Colo. 404.

But we do not read § 666 (a)(2) as being restricted to appropriated rights acquired under state law. In the first place "the administration of such rights" in § 666 (a)(2) must refer to the rights described in (1) for they are the only ones which in this context "such" could mean; and as we have seen they are all inclusive, in terms at least. Moreover, (2) covers rights acquired by appropriation under state law and rights acquired "by purchase" or "by exchange," which we assume would normally be appropriated rights. But it also includes water rights which the United States has "otherwise" acquired. The doctrine of *ejusdem generis* is invoked to maintain that "or otherwise" does not encompass the adjudication of reserved water rights, which are in no way dependent for their creation or existence on state law.³ We reject that conclusion for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666 (a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights.

It is said that this adjudication is not a "general" one as required by *Dugan v. Rank*, 372 U. S. 609, 618. This proceeding, unlike the one in *Dugan*, is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved and as Senator McCarran, Chairman of the Committee reporting on the bill said in reply to Senator Magnuson: ⁴ "S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream

³ See Note, 48 Cal. L. Rev. 94, 111 (1960).

⁴ S. Rep. No. 755, 82d Cong., 1st Sess., p. 9. And see *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U. S. 440, 448.

can be joined as parties defendant, any subsequent decree would be of little value."

It is said, however, that since this is a supplemental adjudication only those who claim water rights acquired since the last adjudication of that water district are before the court.⁵ It is also said that the earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding adjudication.⁶ The last water adjudication in this water district was entered on February 21, 1966, and the United States was not a party to that or to any prior proceeding in this water district. The United States accordingly says that since the United States cannot be barred by the previous decrees and since the owners of previously decreed rights are not before the court, the consent envisaged by 43 U. S. C. § 666 is not present.

We think that argument is extremely technical; and we decline to confine 43 U. S. C. § 666 so narrowly. The absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States.⁷ All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court.

Affirmed.

MR. JUSTICE HARLAN's concurring statement follows the opinion in No. 812.

⁵ Rev. Stat. § 148-9-7.

⁶ *Id.*, § 148-9-13.

⁷ The Colorado court stated:

"We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn." 458 P. 2d, at 770.